1 ------------------------------x

2 IN THE MATTER OF THE PROPOSED
AMENDMENTS TO THE FEDERAL
3 RULES OF BANKRUPTCY AND
CRIMINAL PROCEDURE,

4 ------------------------------x

5 February 5, 2010
6 10:00 a.m.

7 Before:
HON. LAURA TAYLOR SWAIN,
8 District Judge, Presiding

9 HON. WILLIAM H. PAULEY III, District Judge
HON. ELIZABETH L. PERRIS, Bankruptcy Judge
10 HON. EUGENE R. WEDOFF, Bankruptcy Judge
HON. JUDITH H. WIZMUR, Bankruptcy Judge
11 PROFESSOR S. ELIZABETH GIBSON
MICHAEL ST. PATRICK BAXTER, Esquire
12 JOHN RAO, Esquire
CHRISTOPHER KOHN, Esquire
13 JAMES J. WALDRON, Clerk

14

15

16

17

18

19

20

21

22

23

24

25

JUDGE SWAIN: Good morning, everyone. I am Judge Laura Taylor Swain, and I chair the Advisory Committee On Bankruptcy Rules. I welcome you all to our public hearing regarding proposed bankruptcy rule amendments and new proposed rules that were published for comment in August of 2009.

The witnesses testifying today will principally be addressing the proposed amendments to Rules 2019 and 3001(c) as well as proposed new Rule 3002.1.

We have also received a number of written comments on the rules and expect to continue to receive written comments through the cutoff date of February 16, 2010. All of the written submissions that we have received are posted on the rules website at uscourts.gov/rules, and anything further we receive, including supplemental submissions that have been made today, will be posted promptly on the website.

We are truly grateful to all who have submitted comments. It is an integral part of the Rules Enabling Act rules development process, and we are particularly grateful to today's witnesses who have provided informative advance summaries of their testimony.

We have very carefully reviewed the advance summaries, and so that will enable the witnesses to focus on elaboration of the key points that they wish to communicate and also will allow time for questions from committee members within the 10- to 15-minute target timetable per witness that has been

allotted.

We would be grateful to the witnesses and will try also to moderate, if you will, the extent of our questioning to stay attentive to this timetable since there are many here who need to travel south this afternoon, and the severe weather does threaten complications. So let's all work together to make sure nobody gets stuck anywhere that they don't want to be.

Do remember the comment period does remain open until February 16, so any additional information or clarifications that anyone wants to submit can be submitted after the hearing and will certainly be considered quite thoroughly. There are copies of the advance testimony and of the pamphlet that includes the proposed rules, that's this gray-and-white pamphlet located there on the front bar of the jury box. Anyone is welcome to take copies if you have not done so already.

This rules proposal pamphlet also includes information about the rule-making process, and that's at the back of the book, beginning on page 77.

At this point, I would like to ask the committee's reporter and the members of the committee who are participating in the hearing today to introduce themselves.

MS. GIBSON: I'm Professor Elizabeth Gibson from the University of North Carolina School of Law. I'm the reporter

to the committee.

JUDGE WIZMUR: Judy Wizmur, Judge of the Bankruptcy Court in New Jersey.

JUDGE WEDOFF: My name is Eugene Wedoff. I am a bankruptcy judge in Chicago.

JUDGE PERRIS: Elizabeth Perris. I am a bankruptcy judge in Oregon.

MR. WALDRON: Jim Waldron. I am the clerk of the bankruptcy court in New Jersey.

MR. BAXTER: Michael Baxter. I'm a partner at Covington & Burling in Washington D.C.

MR. RAO: John Rao. I am a attorney with the National Consumer Law Center.

JUDGE PAULEY: I'm William Pauley, a district judge here in the Southern District of New York.

JUDGE SWAIN: You will see there are a couple of empty places. Those are people from DC who are not able to join us today, but a transcript is being prepared of this hearing and all of the committee members will review it very thoroughly, even if they have not been able to be here in person today. The transcript will also be posted on the rules website that I mentioned so anyone who wishes will have the benefit of the ability to review that transcript as well.

Now I would like to begin with our witnesses. First the witness from the firm of Richards Kibbe & Orbe. I'm not

sure if it's Mr. Friedman or Mr. Kibbe.

MR. KIBBE: Thank you, your Honor.

JUDGE SWAIN: Good morning.

MR. KIBBE: Good morning.

My name is John Kibbe. I'm a partner of the law firm of Richards Kibbe & Orbe, which I'll refer to as RK&O.

Thank you for your substantial work and for the opportunity to comment briefly on Proposed Rule 2019. I would share, with the committee's permission, my allotted time with my partner Michael Friedman.

For two decades RK&O has represented buyers and sellers of stressed and distressed financial instruments, including bank debt trade claims and related derivative instruments. We represent individual claim holders and claim holders working together in ad hoc groups.

We counsel our clients on the disclosures required by the current Rule 2019. We expect to counsel them on compliance with Proposed Rule 2019, and we're testifying before the committee in all of these capacities. RK&O supports the vast majority of Proposed Rule 2019. The full disclosure of all claims and other interests held by informal and ad hoc committee members enables judges, debtors, and other parties to readily identify the true economic interests of active bankruptcy participants.

We believe Proposed Rule 2019 responds to the

increasingly complex world we live in and represents a positive and necessary development in modern bankruptcy proceedings.

However, RK&O respectfully disagrees with two details of Proposed Rule 2019: Disclosure of the amount paid for a claim in the secondary market and disclosure of the date which the claim was purchased in that secondary market.

We believe that Proposed Rule 2019 will function as intended without requiring disclosure of this information, and we believe that there are good legal and practical reasons not to require such disclosure.

First, as I anticipate that you will hear in greater detail from others today, we believe that a requirement to disclose the date a claim is purchased is in effect a requirement to disclose the amount paid for the claim. That's because the price can be determined so well from the date of purchase due to the depth and liquidity of the secondary claim market.

Second, although Proposed Rule 2019 does not require specific disclosure of price unless directed by a court, we believe the opportunity to compel price disclosure will invite the same litigation now being waged by parties that seek to use the current Rule 2019 merely to gain a negotiating advantage in a bankruptcy proceeding.

In the rare case where disclosure of price is relevant to an issue in a bankruptcy proceeding, we certainly support

the well-established discovery procedures or Rule 2004 or sua sponte rulings by the judge in the bankruptcy case to obtain that information.

Disclosure of proprietary and confidential pricing information would substantially affect the negotiating positions of the parties in ways we believe are inimical to two bedrock principles of bankruptcy law: One, the price paid for a bankruptcy claim is irrelevant to determining how a holder of the claim should be treated in the bankruptcy proceeding; and, two, similarly situated creditors should receive equal treatment when seeking to enforce their rights.

Because the price paid for a claim is largely irrelevant as a matter of law to the treatment of the claim, we believe that any purported benefit of direct or indirect price disclosure would be far outweighed by the potential misuse of the information and the related harm to the claims market and the bankruptcy process.

Our clients analyze financial statements. They calculate potential recoveries, and they speculate with their lawyers about potential restructuring outcomes. Thanks to the Bankruptcy Code and the Bankruptcy Rules, those clients have increasing transactional certainty derived from modern bankruptcy jurisprudence, and lawyers can help answer their questions.

One thing we never say to our clients is that there

will be a legal haircut on recovery if you buy your claim in the secondary market. We don't see support for that in the law and, to the contrary, we tell our clients that the foundation of the claim market rests on the bedrock principle that a claim purchased in that market is just as valid and enforceable or as invalid and defective as the claim is in the hand of the original holder.

The concern is that the Proposed Rule 2019, by elevating the importance inadvertently of secondary market price information, could lead to misuse of that information in negotiations and subvert or erode those two bedrock principles.

It would also create unwarranted uncertainty for lawyers trying to advise their clients on expected outcomes. During the last two decades we've seen a more liquid secondary loan claims market, and that's due in large part to the transactional certainty introduced by the Bankruptcy Code.

That market provides an exit for lenders with less tolerance for risk. It frees capital to flow where needed. The claims investor base brings additional capital to the debtors' negotiating table. The market can even help create a firewall around a bankruptcy of a key company and stop the contagion of default and financial failure from spreading to closely linked suppliers and vendors who have the ability to sell their claims and raise needed capital.

We believe that requiring the disclosure of purchase

price under Proposed Rule 2019 will decrease transactional certainty and limit the substantial benefits of a liquid claims market. We would urge the committee to revise Proposed Rule 2019 to eliminate a direct or indirect command to disclose secondary market prices both to preserve analytical clarity in the claims market and to avoid sending the mixed message that somehow in the quest for transparency the price paid for a claim in the secondary market matters.

With the committee's permission, I would yield the remainder of my time to my partner, Michael Friedman.

JUDGE SWAIN: Thank you, Mr. Kibbe.

MR. KIBBE: Thank you.

MR. FRIEDMAN: Thank you.

My name is Michael Friedman I am a partner with Richards Kibbe & Orbe, and I thank this committee for the opportunity to testify regarding Proposed Rule 2019.

Picking up where my partner John Kibbe left off, the price paid for claims and the date of acquisition are closely guarded by distressed investors as proprietary and confidential information regarding a party's investment strategy.

If investors are forced to disclose confidential and proprietary information many investors will like exit the claims market and the market for claims will suffer. Together the result would be to jeopardize the substantial benefits realized from the growth of this claims market.

The participation of sophisticated distressed investors in bankruptcy proceedings has greatly increased the probability of those companies exiting bankruptcy and successfully reorganizing.

When the market for claims is liquid, debtors see prices for claims rise in response to favorable news. Those higher prices generate interest and provide support for exit financing, rights offerings, and other financial accommodations necessary to a successful reorganization.

Moreover, it is those very investors that are purchasing claims who will be more likely to participate in the DIP financing, exit financing, and rights offerings so necessary to these restructurings.

Requiring disclosure of the purchase price will likely dissuade those holders of claims from participating both in the bankruptcy proceedings in an active manner or on ad hoc committees, which would have a significant impact on bankruptcy proceedings.

Bankruptcy proceedings have greatly benefited from the participation of ad hoc committees, because the formation of ad hoc committees allows creditors with smaller claims to join together to advance common positions in bankruptcy proceedings where it would not be economical for them to appear on their own.

Ad hoc committees also provide an opportunity for

groups of similarly situated creditors to pursue economic positions; for example, lenders or bondholders may form committees in situations where an agent or an indentured trustee has either become ineffective or is limited by either actual or potential conflict of interest and have no other way to address their concerns and views other than to band together.

Often ad hoc committees may be the only real party with an economic stake in the proceedings where either there is no official committee of unsecured creditors or if the official committee has been rendered ineffective as a result of resignation of members of the committee. And even when there are committees that are effective, a committee may have an inherent conflict of interest given the diversity of cases we are seeing today and the varied economic interests that those committees are comprised of.

Ad hoc committees also greatly contribute to the efficiency of the bankruptcy proceedings. Ad hoc committees eliminate the need for duplicative pleadings, conserve judicial resources, and reduce costs not only to the group members, but to the other constituents who would otherwise have to respond to duplicative pleadings.

These efficiencies generated inure to the benefit of all creditors in the form of reduced administrative expenses, streamlined proceedings, and ultimately additional value to be

distributed to creditors.

Additionally, absent ad hoc committees, debtors and other parties in bankruptcy proceedings would have to conduct negotiations with important creditors on an individual basis.

Given that similarly situated creditors ultimately must vote on the plan and vote as a class, it is important that they ultimately speak as a collective, and it is important that they do so when negotiating key issues with the debtors, creditors committees, or other key creditor groups.

Finally ad hoc committees provide an important counterweight to other constituents who could otherwise take advantage of smaller creditors who do not have the economic wherewithal or incentive to be actively involved in bankruptcy proceedings.

These creditors may face the real prospect of having a plan confirmed that does not fairly take into account all of such creditors' legal rights and remedies.

By forming an ad hoc committee sizeable enough to attract the attention of the debtors creditors committees or other important constituents, these creditors can defeat such attempts and force counterparties to confront their legitimate concerns and rights.

Therefore, if Proposed Rule 2019 causes distressed investors to either retreat from the distressed market in a significant manner or refrain from actively participating in

bankruptcies, these benefits and efficiencies will markedly decrease.

Small stakeholders will lose their voice, debtors will suffer due to inefficiencies, and debtors will suffer because it will dissuade those very parties that are so crucial to restructuring that provide the needed capital to participate in those proceedings.

Debtors will find it more difficult to negotiate and implement prepackaged or prenegotiated plans because such plans are by definition negotiated with pre-petition ad hoc committees and require the continued participation of those ad hoc committees post-petition. And if there's an unwillingness to serve in that role, it's going to impact the ability to implement those prenegotiated or prepackaged plans.

Proposed Rule 2019 should not give credence to the notion that price matters. For those reasons, RK&O respectfully requests that Proposed Rule 2019 be revised such that the price paid for claims and the date parties acquired such claims be removed from the mandatory disclosure.

Thank you.

JUDGE SWAIN: Thank you, Mr. Friedman.

Professor Gibson, do you have questions for Mr. Friedman and Mr. Kibbe?

MS. GIBSON: Yes. I will address the first one to Mr. Friedman.

Current Rule 2019 does require committees other than official committees to reveal price and date of acquisition information, and the proposed rule would leave to the judge whether to require price at all and would just require the date information.

I guess I'm asking what aspects of the rule make the proposed rule in a sense more troubling to you than the existing rule.

MR. FRIEDMAN: I think, your Honor, first there is obviously a split as to whether or not the current rule applies to a subgroup of lenders or bondholders or any group that are not representing a wider group. Obviously, there is even in the last several weeks up to yesterday, a significant split of opinion on those aspects.

Under current Rule 2019 it is not clear that such disclosure would be required. Your Honor, if it was clear that current Rule 2019 applies to everyone, I think you would have the same concerns. We don't believe that ultimately price in the vast majority is relevant to the issues. It is our position that in those rare cases where price or date of acquisition is relevant, there are enough provisions within the current Bankruptcy Code and Rules to provide for either normal discovery under Rule 2004 or sua sponte motions by the court to get to the heart of the issue and get that disclosure.

MS. GIBSON: If the rule, as some suggested, were

changed, the proposed rule, to only require not the specific date of acquisition, but some time period -- pre-petition post-petition, before the plan was filed, something like that -- would that address many of your problems.

MR. FRIEDMAN: It would certainly go a long way, your Honor. I think obviously the question is at what time period. If it's just pre-petition post-petition, that is certainly something that's not very, that doesn't seem too problematic. To the extent that you start to put time periods on it, that could start to signal an approach, and I think others will talk today about how investors go about creating a position and following through on that position. It is certainly not in any way near the same level of concern as actually having to require the date, but there is still a certain of showing a pattern of activity.

I think, again, for the most part, your Honor, there may be benefits to that. There may in very few instances be benefits to requiring it, or for a judge to know when those claims are being acquired and if there are other agendas being asserted in those cases. But we think those cases are so far and few between that there are other ways that either a judge sua sponte or other parties can get that information.

It just doesn't seem that that should be a focus. I mean the focus of Proposed Rule 2019, which we agree with, as my partner John Kibbe and I said, is that judges should

understand what the positions are. If someone comes into court and says, Judge, please listen to me because I have a hundred million dollars of bonds, and in fact they have a $50 million, you know, half of that position is shorted or is in derivatives, that is something a judge should know about. We don't disagree with that.

What we disagree with is the next step of saying, when did you acquire that and at what price did you acquire that. Once you start putting these parameters in and allowing private litigants to get a foothold of taking a part of Rule 2019, which is a mandatory disclosure, and saying Judge, you should require it, it's going to turn into the same type of litigation you are seeing today.

The litigation of 2019 is an entirely new industry that has nothing to do with disclosure. It has all become simply litigation tactics and leverage in the negotiations. I think that's our broad concern.

MS. GIBSON: Nothing further.

JUDGE SWAIN: Thank you.

Do any other committee members have questions?

Judge Wedoff.

JUDGE WEDOFF: Both you and Mr. Kibbe, Mr. Friedman, have mentioned that there may be rare circumstances in which knowing the date or price at which an interest was obtained could be relevant. I just wonder if you would explain what

some of those rare circumstances might be.

MR. FRIEDMAN: Your Honor, I think for the most part it is irrelevant. I think the date of acquisition is irrelevant. It certainly is irrelevant in all matters to the treatment of the claim.

There are obviously cases, such as the Paper Craft case that goes back sometime, where the price paid in conjunction with other conduct could be relevant to the designation of a vote or for other purposes in the case. But in terms of the treatment of that position, I don't think it should be relevant to the mandatory disclosure.

To the extent it becomes relevant in a case, it may become relevant in conjunction with a position that the party is taking or in conjunction with a plan that they are proposing. In that context I think the discovery rules are adequate and appropriately used in those circumstances to get to the merits of what that party is seeking with respect to their position.

But I think the issue is if it is part of the mandatory disclosure at the beginning of the case, that is where the potential for misuse creeps in, and we've seen it unfortunately, and it's accelerating.

I think this process has been very helpful, and I hope that at the conclusion of this process at least that sideshow can begin to dissipate.

JUDGE SWAIN: Do any other committee members have questions?

Thank you very much, Mr. Friedman and Mr. Kibbe.

JUDGE SWAIN: The next witness is Judge Gerber.

JUDGE GERBER: Good morning.

My name is Robert Gerber. As many of you know, I am a judge here in the Southern District of New York, where I have a fair number of cases with hundreds of millions or billions of dollars in debt. Of course, I speak not as an advocate for players in the system, but I am here vis-a-vis my interests in the federal courts being able to do the things for which we were established.

I was gratified by the bankruptcy community's response to the letter I wrote about a year ago, and what I would like to do today with the committee's permission is to speak to matters since the time of my letter about a year ago, to those like my predecessors who generally endorse the rule as revised, but who seek clarifications or carve-outs, to speak to those lawyers for distressed investors who are still seeking to be free of any regulation, and to talk about a couple of things.

I should say, as I indicated in my summary, that while I would ultimately agree or not quarrel with comments that were made by many of those who are going to be speaking today or who have written letters, I very much like the rule as it's been proposed.

There have now been by my count four decisions on 2019 in the last year. Two, as I understand it, Judges Walrath and Judge Shannon, both in the district of Delaware, have generally subscribed to the views expressed by my colleague Judge Gropper in Northwest Airlines, and have applied Rule 2019 to ad hoc committees pretty much in accordance with what the rule says.

Two others, Judge Sontchi in the District of Delaware and I understand very recently Judge Raslavich in the Eastern District of Pennsylvania have come to an opposite view.

I don't think it's a productive exercise for us to spend a whole lot of time as to which of the contrary perspectives on this is the correct one under the existing rule. I think the real point is that 2019 as it now reads is sufficiently ambiguous if not so ambiguous that some pretty skilled judges are coming to opposite views on its interpretation.

I think that 2019 by reason of the litigation it is engendering warrants reform for that reason as well. A lot of judges are being asked to spend a lot of time on it, and that's one of the reasons that I like the committee's proposal, because it comes up with a rule that cuts off many of the areas of controversy or at least as many as possible.

I think it's fair to say, folks, that there's so much money at stake in our big cases I am afraid that people are going to try to exploit the present rule or any rule that any

of us could come up with for their own purposes, no matter how hard we try.

You can see how in Judge Sontchi's case in Six Flags, litigants tried to enforce 2019 against a constituency that they were negotiating against or litigating against, but they conveniently forgot to do the same thing vis-a-vis their allies.

As a person who cares about the integrity of the system and is not an advocate for a client, that drives me ballistic. I think that's outrageous. I don't know if Judge Sontchi based his decision on that in any material respect. Certainly he stated a lot of other reasons for his view. But if I were he, that would have gotten my attention as well.

So what I would like the committee to do, if it can, is some come up with a rule that is so clear that compliance becomes routine, like Bankruptcy Rule 2014, which has been faithfully complied with for as long as I can remember, or at least in the overwhelming number of cases, and where, if there isn't compliance, curative action can be requested by folks like the U.S. trustees around the country or judges who don't have an ax to grind, who don't have an agenda in this area.

Very briefly about how 2019 has played out in the Southern District of New York in the last year and a couple of instructive examples. So far as I am aware, there is not the dissent in the Southern District of New York that there is in

the District of Delaware or apparently in the Eastern District of Pennsylvania on this issue.

In the General Motors case on my watch, a committee that called itself the Unofficial Committee of Family and Dissident GM Bondholders asked me to appoint them as an official committee, or, more technically, asked me to direct the U.S. trustee to do it. And they opposed the 363 sale of GM that I think many of us know about.

In no less than four pleadings before me, they said in these exact words or very similar words, that they represented over 1500 bondholders with whom the F & D committee has been communicating, with bond holdings believed to exceed $400 million at face value. They went on to say, and please note this, a substantial number of these bondholders invested in GM bonds at or near par values with their pensions and life savings.

Well, especially with statements like those, and consistent with the practice of my district, most recently by Judge Gonzalez in Chrysler, who had similarly required compliance with 2019, I required an amended 2019 in compliance clients with the rule.

When that was done, it provided the required information not for 1500 people or a hundred people, but for three people, of whom only one of the three had bought at par, and the 2019 showed that one of the other two had bought at

prices from a penny to a dime on the dollar, more than half of which was within two weeks of the GM filing, and that the other guy had bought more than 80 percent of his bonds at 12 cents on the dollar in the month just before the filing.

Well, the contrast between what was said and applied to me in those pleadings and what the 2019 revealed was dramatic. Disclosure of the truth didn't affect the allowability of their claims. We'll come back to that. But it painted a very different picture of the message that they were trying to communicate to me.

In another one of my billion-dollar cases, Lyondell Chemical, I had to deal with the issue of disclosure of credit default swaps.

In an adversary proceeding in that case, reported at 402 B.R. 57, I was asked to issue an injunction to enjoin acts by bondholders in Europe that could put the control of the entire Lyondell International enterprise, both in Europe and in the States, in the hands of a European trustee.

I was told in the controversy there that one of the reasons why people were trying to accomplish that or might want to accomplish that was because they had credit default swaps for which an acceleration of the bonds, which the trustee had responsibly held off on, the indentured trustee had, or the appointment of the trustee would be a payment event, and they could cash in on those credit default swaps.

When I was asked to determine the extent of prejudice to the credit default swap holders on the one hand and the other creditors on the other, many of whom, by the way, were presumably distressed investors -- most of the creditors in my cases now are -- there was a material difference in the prejudice. And I required disclosure of the existence of the credit default swaps for that reason. In many cases, those things aren't done.

Sometimes they are and we need to have the power to protect the system against circumstances like that. I should say, by the way, that the world did not end when the credit default swaps were disclosed, and it helped me write a more I would call observant decision in that regard.

Let me talk for a moment about the comments of those who were generally supportive of reform of 2019 but have concerns about price and date, like the folks who preceded me.

When I look at their comments, those that I have heard and those that were previewed by their written submissions, I see that the differences between their views and my own are now pretty modest.

I should say, however, that views of bankruptcy judges on price and date disclosure insofar as I know them -- and I have to tell you there are about 350 bankruptcy judges and I've spoken about this with only about half a dozen or a dozen -- are not uniform. All judges agree, as far as I know, and I

will admit that I don't know totally, that the amount that's been paid to acquire bonds or bank debt or other claims is irrelevant to the amount of the distressed debt investors' allowed claims. Neither I nor others whom I spoke to would quarrel with the contention that we have heard, and likely will hear more about, that the date purchased can reveal the amount paid, at least to those with access to databases that are available to some.

But at least some of my colleagues regard price paid as relevant to the distressed debt investors' behavior in the Chapter 11 cases, or to the extent that other creditors may look to their leadership or to whether a creditor wants to get the case done quick or wait for the debtor to stabilize further.

In any event, all or most judges would likely agree that price paid and date purchased is sometimes relevant, as it was in DBSD North America, another case on my watch where I disqualified the vote of a creditor that bought its claims at par after the plan was filed.

So to say that price paid is always irrelevant is an oversimplification. It doesn't affect a creditor's allowed claim. But in some cases it could be relevant, and I would hope that the committee would have the confidence that we bankruptcy judges could determine when it is and when it's an unfair imposition upon the distressed debt investors who choose

to invest.

I haven't polled the other bankruptcy judges around the country, and I should emphasize that. I should equally emphasize that I speak only for myself. But though some other judges would prefer a stronger regulatory regime, I personally would be amenable to amending the proposed rule to require only generalized discussion of the date acquired, pre-petition versus post-petition, or before or after the filing of a proposed reorganization plan or within or outside of the last 60 days or some variant of that.

Also, although I think this would be somewhat less useful, I could, subject to what I will say next, even live with dropping requirements for any disclosure of the date of purchase. But I think I could support that only if by either the words of the rule or by some kind of accompanying committee comments it were clear that the Court retains the power to require disclosure of both date and price upon an appropriate showing of relevance or other cause, normally by discovery, either under discovery as of right, subject to protective orders as we have in contested matters, or adversary proceedings or by Rule 2004. And, of course, the judge would have to be able to do that on his or her own motion.

I share the concerns that I heard this morning, and I'm likely going to hear more, that if you allow people to ask for more disclosure, people are going to abuse it. I talked

about the episode in Six Flags which outraged me. While I haven't talked to Chris Sontchi, I suspect it outraged him.

For that reason, I would be very amenable to requiring a strong showing of relevance before people can ask for that type of information. But I'm unwilling to accede to the notion that a court can't get it under any circumstances when the Court considers it appropriate or that failures to give judges what they need could ever be circumscribed by parties' claims to the confidentiality of their trading practices or by any usefulness that they might provide or say that they provide to the Chapter 11 process.

Vis-a-vis the comments by the National Bankruptcy Conference, I don't think I have any disagreement. I would say in that connection that I think an important element of my saying what they say is fine is that I understood them to say they would not circumscribe the right of a judge to get that information when he or she thinks it's important.

I will talk a minute about the comments of those that are resisting any reform whatever. A few -- one of them is here today -- still seem to argue that there should be no regulation at all, or in the case of a letter that was written, although we don't have the live witness, would allow for what amounts to self-serving certifications where those making the disclosures determine what should be disclosed, especially with respect to short positions and derivatives.

Frankly, folks, I find those contentions remarkable or worse. While the bankruptcy system was initially created and continued for many years to serve the victims of financial distress -- and creditors can be victims, debtors can be victims, all of the players that we historically had in the system for many years were victims of some sort of another of somebody not being able to meet his, her, or its obligations -- there's more than enough room in the bankruptcy system for those who choose to enter it to make a profit.

But the notion that the transparency and integrity of the bankruptcy system upon which people have relied for decades can be abandoned or cut back to serve investors' desires is very troublesome to me. In fact, it's downright offensive.

As Professor Doug Baird of the University of Chicago Law School, who is hardly a hater of free markets, has written: Long past is the time when we could usefully debate whether claims traded in bankruptcy was a good or bad thing. We should accept that it's become a fundamental feature of bankruptcy. But it's naive to think that this new market, the bankruptcy exchange, should be unregulated. All markets are regulated. Regulation of the bankruptcy exchange is similarly inescapable.

The vast majority of distressed investors act entirely appropriately, whether they're passive investors or when they're participating more proactively, and they should continue in my view to feel welcome in our cases. Most of the

time, their participation is constructive. We have heard about some.

The ability to negotiate with an ad hoc committee is very constructive, very useful, whether those negotiations take place in the pre-petition period leading to a prepackaged or a prearranged plan or in the post-petition period, because we all know that the longer a debtor lingers in bankruptcy, the more risk it is subject to of dying on the operating table.

I am gratified that their trade organizations, the LSTA and SIFMA are amenable to regulation, subject only to the relatively modest comments that we saw in their summary of testimony and their letter.

But if there's any message that I would like to get across today, it is that we should not abandon the federal courts' inherent ability to maintain the integrity and transparency of our system in order to satisfy the needs and concerns of those who choose to enter it and that we should sacrifice those concerns to respond to suggestions that regulating them is going to chill their desire to participate in our cases.

They're using the federal courts. If investors choose to enter the federal courts to achieve their ends, they must comply with the federal courts' basic needs and concerns.

I also should say, and this is in response not to what I have heard yet but which I saw in one or more of the letters,

I can't agree that Rule 2019 as proposed would have the effect of giving debtors inappropriate negotiating leverage. I think anybody with the knowledge of larger 11s knows that in the great bulk of large 11s the negotiation and litigation is one group of creditors against another and that the great bulk of those who are actively involved in that negotiation or litigation are those distressed debt investors who have chosen to invest in different issues of bonds or bonds of different debtor affiliates or in unsecured, as contrasted to secured, debt.

I am troubled, as others are, by distressed debt investors and others creditors using 2019, in either its present form or as it might be amended, for tactical purposes against each other. And I am especially troubled by their invocation of the rule selectively, as they did in Six Flags, looking for enforcement against their opponent but not their ally.

I am not of a mind to abandon the basic regulation we need because of such abuses. Doing so would facilitate even greater abuse and to a loss of tools that we judges need to minimize abuse and otherwise do our jobs.

Finally, very briefly, two technical matters: Short positions, credit default swaps.

I didn't understand the committee to have intended to exclude short positions from the types of interests that need

to be disclosed. In fact, they are a classic example of the types of interest that require disclosure.

But the proposed rule as it's been drafted doesn't mention them explicitly. Of course, it uses terms that are broad enough to cover them, but when you don't say things in baby talk, it provides an invitation for those who bring on the same kind of litigation that Judge Sontchi had to address.

So I would suggest that short positions cry out for disclosure so much that the rule's list of disclosable interests should name them; or, in the committee likes, as a matter of drafting clarity to use broad terms to simply note in the comments that the failure to say them explicitly isn't intentional, and they're simply an example of the types of disclosable interests that are required to be disclosed if they exist.

Similarly, credit default swaps. I talked before about as to how they could be often a matter of very brief concern. Total return swaps may often have the same types of concerns. Both are kinds of derivatives.

It seems to me pretty obvious that they're covered when the rule as it's now proposed and drafted says derivative. But they're in such commonplace use nowadays and can have such a dramatic effect on parties' positions that I think they, too, cry out for disclosure.

Again, committee comment could say it as listing them

as one kind of derivative. Just so long as we're not going to have arguments down the road as to whether matters of such great importance are or are not covered.

There was a technical comment that often credit default swaps are closed out very quickly. That may be so. But to the extent that's the case, they will simply be listed as closed. I thank the committee for its patience and I would be happy to answer any questions.

JUDGE SWAIN: Thank you, Judge Gerber.

In the minute or two that we have left in Judge Gerber's allotted time, are there questions?

Professor Gibson?

MS. GIBSON: Judge Gerber, you talked about the need to make the rule clear so we don't have continued litigation over its meaning.

I just wondered, if the rules committee were to eliminate the provision that expressly gives the court authority here to require information disclosure about the amount paid for someone's interest in the debtor, would you have concerns that there might be litigation about the extent that the Court does have inherent authority to order that?

JUDGE GERBER: I think you can put it into a comment. If you wanted a clean, tight rule, take it out of the main rule and simply say in a comment, as I've seen in other contexts, nothing in this rule impairs the inherent ability of the Court

to authorize disclosure when such information is relevant by discovery, 2004 or otherwise.

I am not looking for disclosure on those things, but what I am looking for is for a loss of the forfeiture of a right of a judge to get that when he or she thinks it's necessary.

JUDGE SWAIN: Thank you. Do any other committee members have questions for Judge Gerber?

Judge Wizmur.

JUDGE WIZMUR: Conversely, Judge Gerber, do you believe that the inclusion of the present language fosters litigation, encourages motion practice about this issue?

JUDGE GERBER: Judge Wizmur, I think that in this environment people are going to use the opportunity to litigate over anything they can, no matter what we do. But I would look to those who are the players in the field to answer that.

My view is I am comfortable with not expressly requiring it, as long as inherent rights are preserved.

JUDGE SWAIN: Thank you Judge Gerber.

JUDGE GERBER: Thank you, folks.

JUDGE SWAIN: Our next witness is Elliot Ganz of the Loan Syndications and Trading Association.

Good morning, Mr. Ganz.

MR. GANZ: Good morning. Thank you.

My name is Elliot Ganz, and I am the general counsel

of the Loan Syndications and Trading Association. On behalf the LSTA, I appreciate this opportunity to testify on proposes amendments to Rule 2019.

The LSTA appreciates the efforts the advisory committee has made to amend Rule 2019 to address legitimate interests and concerns.

Our comments and suggested revisions and my remarks this morning are offered in the spirit of trying to improve upon the substantial work the committee has already performed.

First, some background.

The LSTA is the trade association for all segments of the corporate loan market. With more than 300 members, the LSTA undertakes a wide variety of activities to foster the development of policies and practices designed to facilitate loan retention and sale of loans in the secondary markets, both par and distressed.

One of our critical roles is to advocate on behalf of our members, whether through the filing of amicus briefs in important cases, or, as here, to comment on legislation or rules that impact our market.

In 2007, the LSTA took the view that Rule 2019 should be repealed in its entirety. While the problems that led us to take that position are real and continue, on reflection we have come to appreciate that this view may have been an overreaction.

The LSTA supports the salutary objective of mandatory disclosure that will allow the court to understand the true economic stakes of the participants in the bankruptcy process.

The LSTA believes that Proposed Rule 2019 satisfies these legitimate disclosure concerns by requiring each holder in a group -- or if the court so requires, a party in interest acting separately -- publicly to disclose the nature and extent of its economic interest in the debtor, including short and synthetic positions such as credit default swaps.

The LSTA supports the amendment to the extent it would require those disclosure that will enable the bankruptcy court the debtor and other parties in interest to not only appreciate how large the group's collective voice looms in the restructuring process, but also to understand how long the committee members truly are on a net basis in their holdings.

(Continued on next page)

MR. GANZ: We believe, however, that Proposed Rule 2019 goes beyond these practical and necessary requirements because it would compel public disclosure of a party's most confidential and proprietary information; the date and price at which the market participant purchased and/or sold its bankruptcy claims.

And, while Proposed Rule 2019 purports to provide a safeguard with respect to the disclosure of the price paid in a transaction by requiring that the court must direct such disclosure, the protection provided by this safeguard is illusory. As I will demonstrate, so long as one knows the date of the purchase or sale, prices can easily be determined by reference to numerous readily available pricing sources for both bonds and loans.

Others have testified or will be testifying about a number of important points that we have also covered in our comment letter. Consequently, I will not address these issues now and instead will focus on the close relationship between the trade dates and trade prices for distressed loans and bonds and demonstrate how any market participant with access to popular pricing services can easily determine within a very narrow band the prices of distressed bonds and loans so long as it has the trade dates.

I now refer you to the Powerpoint presentation that I have distributed to the members of the committee.

Slide number two. There are two main take aways. By reference to widely available pricing services, market professionals can easily calculate actual distressed trade prices. Consequently, requiring disclosure of trade dates under Proposed Rule 2019 is tantamount to requiring disclosure of the prices themselves.

Let's start with bonds. All bond trades must be reported by broker dealers through FINRA's TRACE system within 15 minutes of execution. So actual trade times and prices, but not counterparties, are available both on a real-time basis and on a historical basis. The information is available to anyone who subscribes to Bloomberg or Thomson Reuters, which is pretty much everyone in the market.

To illustrate how this works, let's look at the next slide.

This slide is a snapshot of a TRACE page on a Bloomberg screen. The screen shows prices for Abitibi bonds traded from the period of December 30th through January 6. Abitibi is paper producing company that is in bankruptcy.

The column on the left shows the date of the trade, and third column from the left shows the actual trade price. Since distressed bonds tend to trade within a tight intra-day range, if you know the trade date you generally determine within a narrow band the price that was paid for that bond.

As an aside, note that the price paid on December 30th

was 13 percent of par. Just a few days later, on January 6, the price was 22 to 24 percent of par. So knowing whether a party traded on December 30 or January 6 can be very revealing. The date matters.

Let's move on to loan prices which are somewhat less transparent but can still easily be determined once you know the date.

As slide five notes, at the end of each business day loan pricing services report mark to market loan prices on a facility-by-facility basis to their subscribers. These prices represent the average of the mark to market prices reported by the dealers who cover each of these loan facilities. Prices are available globally for over 4,750 tranches, about 60 percent of which are domestic.

Slide six is a snapshot of what a subscriber to LSTA/Thomson Reuters pricing services get. The column on the left identifies the loans and facilities for which that investor has subscribed. The columns in the middle list the average bid and the average ask for that facility as reported by the dealers at the end of that business day.

So assuming those mark to market prices are accurate, a subscriber to this pricing service can determine the prices paid for a loan as long as it knows the trade date. This of course begs the question: Are the mark to market prices accurate?

Since slide seven is just the market loan pricing service screen page, let's move to slide eight.

The LSTA analyzes the actual trade data received from over 30 dealers to audit the accuracy of mark to market prices. The dealers, as well as about 20 institutional fund managers, send the LSTA actual trade data on all trades they have done in the previous quarter. The LSTA compares the prices at which parties actually transacted to the mark to market prices submitted by the dealers to the pricing service.

We have been able to determine that mark to market prices are very accurate even through the most volatile period in the history of leveraged loan market.

The chart on the left of slide nine illustrates the incredible volatility we have experienced from the first quarter of 2008 through the third quarter of 2009. Prices went from an average of 90 percent of par to about 70 percent of par and then back up again to a high 80 percent context.

Nevertheless, as the chart on the right shows, the average price differential between the mark to market prices and actual prices never exceeded 225 basis points or two and a quarter percentage points even during the most volatile period. In the most recent quarter, as the markets have calmed, that differential was only 100 basis points or one percentage point.

The previous charts looked at all loan trading, but what about distressed trading?

Let's move to slide ten.

The LSTA tested the data submitted by ten large distressed fund managers in 2009. We looked at 3,500 distressed trades representing over 3.5 billion dollars and 250 individual loan facilities. We found that the average price differential was only 160 basis points, incredibly tight given the unprecedented volatility in 2009. This signifies that, on average, distressed loans traded within only 1.6 percentage points of the mark to market price on trade date.

Let's look at the chart on slide eleven which graphs that relationship.

This chart breaks out the distressed trades by month. The dark green bars on the left represent the average mark to market distressed prices and light green bars on the right represent the actual distressed prices. You can see how close they are.

The inescapable conclusion: Even in the distressed loan market, if you have the trade date you can easily determine the trade price so long as you have access to mark to market prices.

The bottom line: Requiring disclosure of trade dates under Proposed Rule 2019 is tantamount to requiring disclosure of the prices themselves.

In conclusion, the LSTA supports Proposed 2019 to the extent it would require the disclosure of information that will

allow courts and stakeholders to appreciate the actual net long position of each member of a group as well as the group collectively.

We recommend, however, that Proposed Rule 2019 be modified to remove any provision that would either require disclosure of trade date information or invite tactical, time consuming and distracting litigation to compel public disclosure of pricing information, information that, in accordance with fundamental principles of bankruptcy law, is legally irrelevant.

We think our revised proposal effectively addresses the need for transparency while also encouraging the beneficial involvement of sophisticated market participants who are very reluctant to reveal their valuable proprietary information.

Once again, I thank the members of the committee for their hard work and the opportunity to address you. I am happy to address any questions.

JUDGE SWAIN: Thank you, Mr. Ganz.

Professor Gibson?

MS. GIBSON: I don't have any questions.

JUDGE SWAIN: Do any committee members have any questions?

Judge Wedoff.

JUDGE WEDOFF: Mr. Ganz, your organization would have no problem with the rule providing that judges may sua sponte

require disclosure of information regarding?

MR. GANZ: No, we would have no problem with that.

JUDGE SWAIN: Do any other committees members have questions for Mr. Ganz?

Thank you so much, Mr. Ganz.

MR. GANZ: Thank you.

JUDGE SWAIN: Our next witness is Kirk Wickman of Angelo, Gordon & Company.

Good morning, Mr. Wickman.

MR. WOLFE: Actually Mr. Wickman couldn't be here today, he's out of town, so I'm Forest Wolfe, the deputy general counsel at Angelo, Gordon.

As you can hear from my voice, I'm a little under the weather, so my comments will be relatively brief, but I think it was important to have a representative of the distressed investment community here to give our perspective in answering questions you may have.

Angelo, Gordon is an investment advisor who has been registered with the Securities & Exchange Commission and has been in business for over 22 years. We currently have approximately 21 billion in assets under management and pursue multiple investment strategies but are probably best known for our distressed investment strategies.

Over the last 22 years Angelo, Gordon has invested on behalf of our clients and acquired over 37 billion in claims in

distressed companies, and that represents investments in about 550 different companies. As a frequent investor in distressed securities, Angelo, Gordon often participates in ad hoc groups of the sort at issue in 2019. And the main reason that we do so is for judicial efficiency obtained by common representation. We recognize that we're often not uniquely situated as a creditor, and it is efficient for similarly situated creditors to share the cost of legal representation. In addition, having multiple creditors represented by the same counsel makes the proceedings more efficient and negotiations more efficient.

Turning now to the information that we're discussing here under the Proposed Rule 2019, particularly price and trade date, I have a few comments. And first let me echo the comments of the bankruptcy bar that have been made and will be made regarding our view that, for the most part, price information should be irrelevant to bankruptcy proceedings.

The representatives of the market have done a good job of providing an analysis of why that's our view, and I think we would discuss any unusual circumstances where it may be relevant, and we concur that the normal discovery process should adequately cover that situation.

In reference to Judge Gerber's anecdote about GM, it would be my view that the parties there open themself up to price discovery by referencing the price paid by the committee

in their pleadings and it wouldn't be necessary to be included in 2019 for the judge and the parties to have access to that information.

But the main reason I am here is that as a large player in the area I want to give you our perspective on this information, price primarily, and, by extension, trade data.

As Mr. Ganz just explained, Angelo, Gordon treats this information as extremely confidential and proprietary. We believe that disclosure of this information would bring harm both to our firm as investment advisor but also to our investors.

From a proprietary standpoint, disclosure of this information puts data in the public domain that could be used by our competitors to reverse engineer our trading strategies or by copycats to attempt to follow our trading strategies. Even incomplete data would allow for partial simulation of our strategies which we believe could undercut our view that we offer a value added because of those strategies.

For investment advisors like Angelo, Gordon, these strategies and models are trade secrets and we undertake to protect them to the maximum extent possible. And as a measure of how strictly we protect this information I want to describe the measures that would be put in place.

Every employee that joins Angelo, Gordon, as a condition of becoming an employee agrees to be bound by strict

confidentiality obligations because we don't want our trading strategies to become public knowledge. These obligations extend beyond the person's employment with the firm. Likewise, all of our vendors and consultants who provide services for us sign comprehensive confidentiality agreements to the extent they come in contact with non-public data.

Also our investors, which include a broad range of state pension plans, corporate pension plans, Taft-Hartley plans, large institutional investors and high net worth individuals, understand the sensitive nature of this data. In some of our funds, real estate, for example, we do detail an investment, do a full cost basis and give an explanation, but in the distressed area we do not. At most we would provide the top ten position holdings of what the positions are, but we do not disclose, even to our investors, the price information while we still own it. Several years after a fund has been liquidated there are times when that may become public knowledge and we view it as stale and the strategy is no longer relevant, but our investors do not have transparency to the cost basis of the investments.

Finally, I would like to address the consequences of including this type of information in Rule 2019. I think the members of the bankruptcy bar will talk about the motion practice and the inefficiencies that that may create, my real focus is that if it became common practice that this type of

information was to be required, I think the effect on Angelo, Gordon would be that we would stop participating in ad hoc committees. It's not that we would stop investing in distressed securities, but we may invest in fewer of them because we would feel the need to take individual representation, whoever wanted to be heard, but that would lead to more parties and more lawyers in the bankruptcy courts, and I don't think that's a worthwhile result in this instance.

Finally, one last comment; it's one that is echoed in a comment letter from LSTA and SIFMA. They made a clarifying proposal in the rule to add to the definition of "group" that it exclude various funds represented by one investment advisor. This is something that is important to us in that we have over twelve distinct funds that may be investing in distressed investments. Investments are allocated across those funds in accordance with our internal allocation policies, but again, as a way to forestall future litigation about whether those twelve individual entities are acting as a group because that they are managed by Angelo, Gordon, we think that the advisory committee should address that. Following on Judge Gerber's comments, I think it's fine to address in a comment if you don't want to address it in the rule itself, but it is an important note.

I would like to thank you for your time and your consideration of this rule and I'd be happy to answer your questions.

JUDGE SWAIN: Thank you, Mr. Wolfe.

Professor Gibson?

MS. GIBSON: Mr. Wolfe, you mentioned that you believe that relevant price information could be obtained through discovery. Do you also share Mr. Ganz's view that the court would have an inherent authority to require that under appropriate circumstances?

MR. WOLFE: Yes, I think that's true under existing law and should be maintained. Our only comment is that the parties have the opportunity to seek confidential treatment of protective status under protective order so they wouldn't necessarily come into the public domain just because it was a court record.

MS. GIBSON: That's all I have.

JUDGE SWAIN: Thank you.

Do any other committee members have questions for Mr. Wolfe?

Thank you so much, Mr. Wolfe, and I hope you feel better soon.

MR. WOLFE: Thanks.

JUDGE SWAIN: Next we have witnesses from White & Case, or a witness?

MR. LAURIA: A witness.

JUDGE SWAIN: Mr. Lauria, good morning.

MR. LAURIA: Good morning. My name of is Thomas

Lauria, I'm the global chairman of the financial restructuring and insolvency practice at White & Case. I appreciate very much having the privilege to speak with you this morning and offer input into the committee's decisions regarding a rule which I consider to be quite important to the efficacy of the bankruptcy process.

I want to be clear off the top that I am not here representing or at the request of any client or group of clients. I am here as a professional who has been engaged in the practice of restructuring companies and representing diverse parties in these cases for 24 years and have great concern about the efficacy and effectiveness of the process.

During my career I have represented debtors, official creditors committees, ad hoc committees, bank groups, individual banks, individual creditors, trade creditors, distressed investors, equity holders, sovereigns; in fact, I would say essentially every different type of party that you could think of in a Chapter 11 case.

We devote our energy principally at this point to the very largest cases and we're concerned that Bankruptcy Rule 2019 as it exists has become a problem and indeed an impediment to the Chapter 11 process and that the amendments that have been proposed will make it worse, not improve those problems.

In particular, we support and would urge the committee to consider repealing the rule. We believe that it is

unnecessary; that the court of course has the inherent power to direct disclosure of information as may be relevant to any particular case. We feel that the rules of discovery are available to the other parties in the case to compel discovery and disclosure of information that may be relevant to the case.

We think that Rule 2019, no matter how carefully drafted, is in effect a one size fits all rule which by definition is always going to have problems and gets in the way of what we think would be a far more effective solution to the problem, which is customized disclosure in discovery depending on the unique facts and circumstances of any particular case. Not only would that result in parties seeking the information having to establish some basis or relevance for the information sought, but it would also offer the Court the opportunity to consider providing appropriate protections to the party being required to disclose the information such as confidentiality or limited disclosure. In short, custom build a suit for the customer, not put him in a one size fits all.

I want to turn to what I think should be the first and perhaps most important consideration of the committee in its deliberations regarding this rule, one that I think is distinctly unaddressed by the submissions and the comments that I have heard so far this morning, and that is the impact of this rule on parties' due process rights.

I think by definition a rule of procedure always needs

to be measured and considered first and foremost in terms of its impact on due process rights. Let's not forget that a bankruptcy case is a court case and that the parties who participate in the case all have the right to participate and that the Constitution protects the right to do so in a full and appropriate fashion.

The reality is that Bankruptcy Rule 2019 as it exists and it's proposed to be amended will be a barrier to free and open participation in the bankruptcy process. It is an admission ticket to that process that is unusual, I would say even extraordinary, when you think about how litigation is conducted in the court system. It is not a regulation of any market, it is an admission ticket.

During my years of practice I can say that I have never seen Bankruptcy Rule 2019 brought to a court's attention other than as a tactical device. And most recently, I have been involved in four cases that where 2019 issues have been brought up: The Washington Mutual Chapter 11 case, the Chrysler Chapter 11 case, the Six Flags Chapter 11 case and the Mirant Chapter 11 case.

I think I want to start with Mirant. In Mirant we represented the debtor. In that case we had three official committees and four unofficial committees acting in the case. It was quite difficult in that we had seven focal points of tension within our capital structure.

We reached a point in the process where we were having difficulty with one ad hoc bond holder group, and we concluded that we would be able to put some pressure on them by requiring them to comply with Bankruptcy Rule 2019. A motion was put together, it was actually filed. We subsequently decided that it was an inappropriate use of the rule and withdrew the motion, but the entire analysis of whether to bring 2019 into the process was a tactical decision.

I have been on the receiving end of 2019 in a couple of cases since then. In the Chrysler case I represented an ad hoc committee of bank debt holders who at the commencement of the case were the only opponents to the 363 sale that was proposed and in fact were being put under significant pressure by the federal government to withdraw their resistance to the transaction.

Of course, immediately our opponents demanded that we comply with Bankruptcy Rule 2019, and that compliance was ordered. The consequence was that the group, fearful of the effect of being made public, disbanded. I should note that we offered to provide all of the information under seal and subject to confidentiality to the principal litigants in the case, but that was unacceptable and the court determined that it was not required under the rule and directed full public disclosure.

In the WaMu case we represent a senior class of note

holders, and as negotiations progressed, about a year into the case, one of our principal opponents, JP Morgan Chase, determined that an advantage could be obtained by compelling 2019 compliance. The motion was filed and Judge Walrath granted that motion and wrote a lengthy opinion addressing why compliance was required.

The consequence in the WaMu case is that our client group, who holds over $2 million of debt against the company, is trying to decide if they're going to continue to participate in the case because, as the representative from Angelo, Gordon testified earlier, they all consider their trading positions to be extremely confidential and deeply proprietary and fear that the disclosure of their positions will permit mischief in the market to their disadvantage.

I also want to mention the Six Flags case. In the Six Flags case we represent the note holder class or group at the parent company who was the ally of the official committee who sought 2019 disclosure from the competing bond holder group that we are in dispute with. I can tell you that we had nothing to do with the filing of that motion, didn't even know it was going to be filed until it was in fact filed, but I can assure you that it was a tactical device, not a substantive one.

In short, what I'm suggesting to the panel is that I can't think of any utilization of this rule other than as a

tactical device. And I think that the panel should ask the question why. Think about the question why.

My opinion is that the information contemplated by 2019 is largely irrelevant to the progress and prosecution of a Chapter 11 case, and as a consequence it only comes up when somebody is looking to get a leg up.

On the other hand, I think it's interesting that the submissions that have been made supporting the continuance of the rule or the expansion of the rule offer no evidence or cite to a single case where 2019 was utilized to root out an undisclosed conflicting interest that had resulted in harm to a bankruptcy case. As such, I think what I'm forced to combat here is a little more than innuendo and speculation, which should be enough. Taken on the other side, we always see a tactical use of the rule. And I think that when largely unsubstantiated allegations of bad acts by an admittedly small number of parties in Chapter 11 cases are transcribed into a penalty that would be applied against all similarly situated, we should all be wary and skeptical.

I also want to note that there certainly is bias in certain of the submissions. I note in particular the submission of the National Bankruptcy Conference which proposed certain amendments to the rule but continuance of the rule to exclude without explanation bank agents and indentured trustees from the rule. Are we to assume or understand that bank agents

can't be engaged in CEFs or acquired interests that would give them conflicts in bankruptcy cases that could impact adversely the outcome? I don't think so. Certainly by experience, that's not the case.

I would like to use a hypothetical case to illustrate how I think the process works and how I think bankruptcy rule 2019 can impact adversely the process. Let's just imagine debtor corp, a large business that files Chapter 11 with a very simple capital structure, a billion dollars of secured bank debt and $2 million of unsecured claims which include trade debt and unsecured bonds. Let's put into the mix Joe's Garage, a creditor of the debtor corp that happens to have at the time of filing $100,000 receivable for services provided to the debtor.

Now early on in the case it's established by the investment bankers that the company is likely to have a valuation of a billion one and billion two, meaning that Joe's Garage can expect a 50 to 100 percent recovery. However, it becomes apparent that it's going to take six months to a year to get that recovery and that the recovery, because the company doesn't have debt capacity, is going to be all in stock in the company.

Joe's got a problem. Joe's garage has a payroll to meet, and that stock that he might get in six months to a year isn't going to help him make his payroll. So Joe's approached

by a speculator, a distress trader who agrees with the valuation that the debt may trade -- that the company is worth a billion one to a billion two and is willing to take the risk on working through the process and getting that recovery, which will be in stock, and offers Joe's Garage 25 cents on the dollar; in short, $25,000 for his $100,000 claim. Joe's gladly accepts the $25,000 in cash so he can continue on his with payroll and goes on with his business. So the speculator goes out to other creditors, bond holders, and buys up $10 million of debt, 25 cents on the dollar, and sits back and waits for the process to conclude, provide his recovery.

Now unbeknownst to the speculator, the banks, who are frustrated with the fact that they will have to convert debt into equity, which they're not happy about, take the view if we have to take equity we want all the equity and all the up side, so they hire bankers and lawyers and develop a valuation that suggest the company is worth 900 million; in other words, not enough to provide any recovery benefits for the creditors. And the banks, who have a lien on all the assets and also the debt lenders in the case, have a very tight control over the company's liquidity. So the company is in essence forced to preserve itself to be rehabilitated to continue the going concern to agree to the bank's plan based on the $900 million evaluation, leaving unsecured creditors wiped out.

Now the speculator standing alone doesn't have the

wherewithal -- he has just gotten $10 million of claims in this case -- to fight the banks and the debtors with their advisors in tow. So he joins forces with Fulcher, another distressed trader, who has bought $50 million in claims but because he bought his claims after the bank plan came out, bought them for only 10 cents on the dollar.

So we have $60 million of claims between the two of them bought at an average price of 17 cents. Together they hire lawyers and bankers and put forward their own valuation that establishes that the company is worth a billion one to a billion two. This dispute will then be litigated, and ultimately they'll win or lose or there will be a settlement, but that's how the process is supposed to work. It's a level playing field for the resolution of this dispute, and speculator and Fulcher are both playing by rules that they can understand.

Now let's add 2019 to the mix. Same scenario, except the banks file a 2019 motion and say we're concerned about the motives of speculator and Fulcher. They're known distressed traders, we don't know what they're up to here, they're making a mess and making this case more complicated and difficult than it needs to be, we want them to comply with 2019. The court takes the view that the strict interpretation of the rule requires compliance.

That leaves speculator and Fulcher with two options.

They can comply with the rule, continue their case, but they face the risk of adverse trading and disclosure of proprietary information, so they may decide just to withdraw. Or they file their compliant disclosure and they pursue the litigation, but now not as holders of $60 million of claims but holders of $60 millions of claims who invested 17 cents on the dollar in claims.

And this litigation becomes very difficult, it becomes protracted. Valuation litigation, as I'm sure everybody here is aware, sometimes can really go on and on and on; experts are developed, cross-examination, et cetera, other disputes arise in company claims. And the court, becoming concerned about its duty to promote the rehabilitation of this company and to preserve going concern value, to prevent the patient from dying on the table, starts considering the motivation of speculator and Fulcher and considers the fact that there is probably a fair basis for treating differently those who are forced into the Chapter 11 process as opposed to those who voluntarily entered the Chapter 11 process as investors.

And the court decides that I'm not going to allow these speculators to hold hostage the reorganization process and perhaps jeopardize a reorganization, costing jobs and other adverse consequences, just in the name of getting a very fat, healthy return. So the Court supports, directly or indirectly, a compromise, a compromise that provides a full return of 17

cents on the dollar. Fair enough. They got the 17 cents back, but we also achieved reorganization of the company. It can simply be done by the discretionary determination of what value is and leaving the losers in that litigation with the prospect of having to pursue a stay pending appeal, which we all know is obtained almost never, to preserve any kind of rights.

So what's the impact? Well, speculator and Fulcher may well decide to get out of or cut way back on their participation in buying distressed securities or claims against debtors. Why? Because it's become unpredictable. They can't do an analysis of valuation and be comfortable that their claims will be given the same respect they should be given if they pay par as opposed to being a speculator who bought at a discount.

Now who cares if speculator and Fulcher get out of business? Maybe we're all better off that we don't have these guys in bankruptcy cases. But let's think about Joe for a minute. Let's go back to Joe's Garage. Who is going to buy his claim? I submit either no one is going to buy his claim, in which case there's no one to fight valuation, there's no one with the wherewithal or the resources to fight valuation, in which case the wipe out plan just gets confirmed without compromise and without opposition; or he's going to sell his claim for less because people are going to take into account the possibility that the fact that they paid a discounted price

will be made public and will be in the courtroom when the litigation over the parties' recovery occurs.

We're all humans, judges included, and I don't think it's possible for a judge, once informed of the price a party paid for a claim, to be able to ignore it and forget it during the pendency of the case despite how much we tell ourselves that it's irrelevant. So the consequence is either Joe gets nothing and maybe ends up in bankruptcy of his own or Joe gets less for his claim. And let's not limit it to Joe. Small banks bought into the bonds, they're not going to get as much.

In fact, the whole investment decision that people make when they're extending credit may change. I think it's fair to say that banks and institutions and investors, when they buy debt when it's issued all understand that if things don't go well there is a liquid market into which they can sell that debt and recover some cash on their investment which they can put back to work rather than having to be put in a position where they would have to ride all the way through the bankruptcy process if in fact their borrower ends up in bankruptcy, which we all know is complex and expensive and not every bank and not every investor has the resources or the appetite for dealing with that process. So people will start becoming far more cautious in how they put the money to work if they aren't comfortable that there will be a liquid market available for their investment if things go poorly.

JUDGE SWAIN: I ask that you wind up because we are going over time. I want to have some time for questions.

MR. LAURIA: I apologize. The point I want to make I guess in closing on this is that the rule is unnecessary.

Let's assume that Fulcher and speculator in fact did have some evil intent or had conflicting interests. There is nothing that would stop any other party in the case from seeking discovery of that, and if the Court determines that that discovery would lead to relevant evidence that would influence the participation of these players in the case or the outcome of the planned process from doing so and from obtaining that information. But it would be done on the basis of the facts and circumstances of the case, it would be done in a customized way, it would be done only to the extent necessary to provide relevant evidence, and it would provide the parties producing the evidence with appropriate protections.

So I simply think that we're arguing about terms of a rule that by definition is never going to properly fit every circumstance because there are just too many different circumstances and we can always get what we need either through the court's inherent power to say who do you represent and what claims do they hold or as a consequence of the discovery process. Thank you.

JUDGE SWAIN: Thank you, Mr. Lauria.

MR. LAURIA: I apologize for going over.

JUDGE SWAIN: It's a big topic.

Professor Gibson?

MS. GIBSON: I don't have any questions.

JUDGE SWAIN: Do any of the committee members have questions?

Judge Wizmur.

JUDGE WIZMUR: You have certainly represented many distressed investors. Can you give us an idea how often, in your opinion, such distressed investors hold positions that may be objectively said to be in conflict with the reorganization principles that we understand; the credit default swap position that might come in if the reorganization fails, for instance?

MR. LAURIA: Your Honor, I am not aware of having represented a bond holder or investor who had a credit default swap that impacted the desire of that party to maximize a recovery on its claim.

I had one experience where the banks involved in the case we believe did have a credit default swap and as a consequence didn't approve an out-of-bankruptcy restructuring, that is a restructuring that would have avoided bankruptcy, because we were under the impression that a number of leading banks in fact had CEFs that would only be triggered by a default in a bankruptcy. So rather than agreeing to an out-of-court restructuring they forced the bankruptcy filing. That's really the only circumstance where I encountered it.

What's interesting to me is there's a lot of discussion about this, and a lot of it is theoretical, but in fact I haven't really come up against it. And I can assure you that it would be a matter of grave concern to me if clients ever said that we want to take actions that would be adverse to the policy and principle of maximizing value in a bankruptcy estate in order to enhance recovery on a derivative instrument. In fact, I don't know that we would be able to continue with the representation of a party under those circumstances.

JUDGE SWAIN: Thank you.

Are there any other questions from committee members?

Ladies and gentlemen, at this point we're going to take a ten-minute break. When we resume we'll hear the final Rule 2019 witness and then go directly into the testimony concerning Rules 3001 and 3002.1.

It would be my intention in view of the weather to try to conclude the hearing by about 1:30. If we're not concluded at that point we'll take a brief half hour break so people can get some lunch in the cafeteria before it closes and resume at two o'clock. So I just want to be sure that you keep that in mind.

And for any Rule 3001 witnesses who arrived after we began, please be assured that the committee members have read thoroughly the advance submissions, and so in making your presentation don't feel that you have to renew orally

everything that you have submitted to us in writing. You can focus on your key points and elaborate on those as you wish to, and we're asking that you keep your remarks to the 10 to 15 minute range allowing for some questions.

Thanks so much. We'll see you all in ten minutes.

(Recess taken)

JUDGE SWAIN: Good afternoon. Our next witness is Abid Qureshi.

Good afternoon, Mr. Qureshi.

MR. QURESHI: Thank you, and good afternoon. And again I appreciate the opportunity to appear before the committee today.

My name is Abid Qureshi, I am a partner in the financial restructuring practice Akin, Gump, Strauss, Hauer & Feld, and Akin, Gump and myself are not here on behalf of any clients. We as a firm regularly represent both official committees and ad hoc committees of note holders or bank debt holders in Chapter 11 cases both in this district and around the country.

It seems that, with a couple of exceptions, that there is a broad agreement around the proposition that there should be disclosure by participants in the Chapter 11 case of the nature of their economic interest, and that is something with which we agree. But we think that another proposition should be equally uncontroversial, and that is no party wishing to

participate in a Chapter 11 case be required as the price for that participation to disclose proprietary and sensitive information that may cause that party economic harm.

Now one of the things Judge Gerber said in his testimony is that the rule should be so clear that compliance becomes routine, and it is with that proposition that we wholeheartedly agree. The thrust of my testimony will be to focus on the provision in the proposed amendment that would continue to allow motion practice with respect to the disclosure both of the date that a claim is acquired and the price paid. And we think that that carve out in the rule needs to be closed.

There are a couple of recent cases that have been discussed. Judge Gerber and others have discussed Six Flags and what an obvious abuse of the rule it was in that case to seek its enforcement against just one or two ad hoc groups active in the case, and I'm sure most of you, if not all, had the opportunity to read Judge Sontchi's opinion.

Another case that Akin, Gump was also involved in is the Philadelphia News bankruptcy. As some of you may not know, yesterday afternoon Chief Judge Raslavich, in the Eastern District of Pennsylvania, issued a lengthy written opinion in that case finding, as Judge Sontchi did, that the existing Rule 2019 does not apply to ad hoc groups.

And I think discussion of those two cases, even though

they obviously involve the existing rule, is relevant because they show the type of motion practice and the type of litigation that -- if the proposed rule as it is currently contemplated is not changed -- will continue.

I'm not going to belabor Six Flags, I think there's been enough discussion about that one. With respect to Philly News, the motion was filed by the debtor. The stated purpose for the filing of the motion was that the debtor was about to hold an auction for its assets. The recipient of the motion, the ad hoc group of senior lenders, was expected to be a participant in that auction, and the debtors indicated that it would help them to determine whether the price that the assets might fetch at an auction is fair if they know what the senior lenders paid for their claims.

And that to me is a classic example of why courts over many years have reached a determination that what a party has paid for its claim is irrelevant. It should not be the case that the debtor accords treatment to its creditors based on what they pay for their claims. And if one accepts that proposition as uncontroversial, as I believe it is in the case law, then there is simply no justification for a debtor, or for that matter any other party in interest in a case, to require the disclosure by a creditor or a group of creditors as to what they paid for their claim. And so what I view to be a loophole in the current amendment to allow motion practice I think does

need to be shut down.

I think Judge Gerber also observed that given the dollars that are at stake in these large Chapter 11 cases, if there is that type of an opportunity in the rule to pursue that type of litigation, it will be used. And I certainly believe, based on my experience in the Philly News case, in the Six Flags case, that if there is a carve out in the rule that allows a party to bring a motion to require price paid to be disclosed that the type of litigation we see in Six Flags, the type of litigation we see in Philly News and in many other cases will continue.

That is an unnecessary burden to bankruptcy judges, to their dockets. Six Flags, Philly News, Washington Mutual are all on appeal. It will now be a burden to the district courts and possibly the circuit courts that have do deal with those appeals, and in my view, it is all unnecessary.

And I think I heard Judge Gerber make a proposal that again from my perspective I think is absolutely right and I respectfully submit should be adopted, which is that the carve out for litigants to bring a motion to require disclosure of price information be removed from the amended rule. And in the comments the committee could include a statement that makes clear that the court continues to have sua sponte the power to order the disclosure of price information if the court believes that to be necessary in any particular circumstances, and that

the discovery rules, such as 2004, remain available to private litigants to the extent they wish to try to seek that type of information in discovery.

I think that strikes the appropriate balance between the need of the court in what I think we can all agree are very narrow circumstances, very exceptional circumstances to require that kind of information, and at the same time not open the door to the type of motion practice that we see in existing cases where a disclosure rule is being completely misused for leverage purposes and as a litigation tactic.

So that is the thrust of my testimony and I'll just stop there. Many of the other witnesses made other points that I don't need to repeat. So of course I'm happy to answer any questions that the committee may have.

JUDGE SWAIN: Professor Gibson.

MS. GIBSON: I would like to clarify one thing. When you talk about -- I take it that your concern is with the price and I assume also the date of purchase information.

MR. QURESHI: Correct.

MS. GIBSON: Let's assume those weren't in the rule or in some other forum, to the extent there still are various disclosure requirements, do you object to allowing a party by motion to seek a determination that somebody has not complied with Rule 2019?

MR. QURESHI: I don't in principle have that objection

but I think the disclosure requirements themselves need to be crystal clear so that compliance, as Judge Gerber said, becomes routine. And if the rule doesn't require any subjectivity, it simply states if you participate in the Chapter 11 process and come before the court you must disclose the nature of your economic interest, what you hold. And if the rule is clear, then sure, if somebody believes that the rule is not has not been complied with that a motion I suppose should be allowed. But I think that's very different than explicitly in the rule allowing for a motion to compel additional information.

So in other words, I think that the date of the acquisition and the price paid should not be open to motion practice at all. But generally if a party wants to file a motion alleging that the rule has not been complied with, I don't think that would be objectionable.

MS. GIBSON: Thank you.

JUDGE SWAIN: Thank you.

Do any other committee members have any questions for Mr. Qureshi?

Thank you, Mr. Qureshi. And thanks again to all the witnesses on Rule 2019. We will certainly consider very carefully your testimony and submissions and thank you again for coming out today.

Would the witnesses on 3001, when the row of chairs there is empty, please come up.

There is a Redwell of papers on the second chair right in front on the barrier. Did somebody on 2019 forget their Redwell?

Good afternoon, ladies and gentlemen, our first witness as to Rule 3001 is Linh Tran, Associate General Counsel of B-Line, LLC.

MS. TRAN: Good afternoon. Thank you very much for the opportunity to appear and comment on the proposed rule. We recommend that the proposed rule not be adopted based on several legal problems.

Before I discuss the legal issues I first would like to provide some background regarding B-Line and myself.

B-Line is a Washington company that is in the business of purchasing and servicing bankruptcy receivables on a nationwide basis. B-Line and its affiliates purchase these receivables from a variety of originating creditors and other sellers.

Before purchasing such receivables, B-Line receives a computer file that contains electronic account information for each account. The computer file generally includes the following: Includes the original creditor's name, the debtor name, the debtor Social Security number, the bankruptcy prepetition balance at the time, it also includes the account open date, the account number or numbers, if there are multiple accounts, the account charge off date, the debtor's personal

contact information, address, phone number, things like that, along with the account activity information, which could include, for example, the last date of payment, the last payment amount, the last purchase date and also include the debtor's bankruptcy information.

B-Line believes this computer file represents the best and most current summary of the status of the purchased account at the time of the bankruptcy filing, represents a summation of thousands -- of hundred of thousands of transactions, depending on how long that debtor had that account.

B-Line relies on this electronic data and its contractual representations and warranties from the seller that the accounts are valid when B-Line filed its proof of claims. The seller's representations and warranties are corroborated by the fact that the computer file includes evidence consistent with existence of a debt; for example, there's a lot of non-public information that would not be available, debtor Social Security number, the full account number, things like that.

And moreover, the validity of the account is further corroborated by the fact that about 99 percent of these accounts that are purchased and we file claims on we never received an objection to claim, whether -- it's for various reasons. There's lots of reasons that a claim could be objected to, but 99 percent of the time there's no objection at

all.

And as B-Line's associate general counsel, I review and manage the objections to claims that we receive on a nationwide basis. And in the 2008 case of Andrews, which I believe precipitated this proposed rule, the Andrews court simply assumed that claims filed by debt buyers are inherently bad due to the fact there's a high volume. There was no factual finding in the Andrews court.

So after the Andrews case we provided the following statics to Judge Small. In 2008, on a nationwide basis, B-Line filed approximately 357,000 claims and transfers, of which we received .29 percent objections based upon lack of documentation. This is in 2008 on a nationwide basis.

Then we provided Judge Small a breakdown for the Eastern District of North Carolina. We filed 8,000 claims and transfers in the Eastern District of North Carolina in 2008, of which we received two objections based upon lack of -- sorry, two objections based upon the statute of limitations, and both claims happened to be in the Andrews case. So for the whole entire year we received two objections in the Andrews case that alleged statute of limitations. We received five objections that were based upon lack of documentation, 13 alleged claim duplication, one alleged that the debt was a business debt and one disputed the value of the collateral.

So if you look at the percentage, it's actually quite

small, at least for Eastern District North Carolina, it's .023 percent of those claims filed were objected to based on statute of limitations. And for lack of documentation it's .057 percent. So I would say it's a very miniscule percentage.

And I will assume that debtor's attorneys -- because at least in the Eastern District of North Carolina there is a local rule that requires debtors' attorneys to review claims and object to claims as part of their presumptive fee that they receive from the court, the panel should also be aware that in the Andrews case the debtor scheduled the debt as undisputed. The plan was a zero percent plan.

And on top of that, our affiliate, which is B-Real, presented evidence that the debtor actually resided in New Jersey at the time this account was opened. And New Jersey has a six-year statute of limitations for contracts versus North Carolina that has a three-year statute of limitations. So I believe the because the debtor somehow moved and decided to file bankruptcy in North Carolina, the three-year statute of limitations -- Judge Small decided to apply that. So arguably there's an issue whether it was barred by the statute of limitations.

And going to the 2009 numbers for statistics, B-Line filed over 300,000 claims and transfers of claims -- this is nationwide -- of which four or five percent received objections to claims based upon lack of documentation. And out of that

.45 percent we litigated two-thirds of those and received a success rate of 85 percent, meaning that -- I defined success as the claim is allowed or somehow we settled with the other side where our claim paid a certain portion.

The one-third we didn't litigate because of costs. And as an example, in Andrews, had the debtor or the debtor's attorney not requested sanctions or alleged SEC TA violations in their objections to claims I would not have entered local counsel. It's a zero percent plan, we wouldn't have been paid at all.

But now let's discuss the legal issues, and I have a couple of other points to make. The biggest concern really is the basis for the rule change. There's a prohibition, as the panel knows, that a federal rule cannot modify or infringe on any substantive rights provided by the bankruptcy code. And I would argue that even though the rule doesn't specifically state that yes, you can object to a claim based upon lack of documentation, but as applied, and what is happening now, is that debtors and courts have interpreted this proposed rule to disallow claims based upon lack of documentation.

(Continued on next page)

MS. TRAN: Currently, there's been at least three bankruptcy courts that I am aware of that have adopted, I think prematurely, this proposed rule verbatim.

I will give you an example. Maryland and the Western District of Washington as of December 1, 2009 have already adopted this proposed rule.

I have already seen objections to claims based upon lack of documentation under this proposed rule. Claims have already been disallowed. I am a little surprised, because in Maryland, which is the Fourth Circuit, there is quite a bit of case law in the majority view, which is the exclusive view that under 11 U.S.C. 502(b)(1) through (9), that you can't disallow a claim based on lack of documentation because it's not enumerated.

I have seen that in Maryland; I have seen that also in the Western District of Washington, even though the Western District of Washington, part of the Ninth Circuit, there's the Ninth Circuit case of In Re Campbell and In Re Heed, which state the same thing as the Maryland case law.

In effect, I think the proposed rule directly conflicts with the unanimous holding of Travelers Casualty Insurance Company of America v. PG&E, which, even though it was a discussion about attorney's fees, there was the holding essentially is that the objecting party must raise a statutory basis under 11 U.S.C. 502(b)(1) through (9) for the Court to

even consider claim disallowance.

The Bankruptcy Code if you look at it, there is a section, Section 101 defines a claim to include debts that are unenforceable, disputed, contingent.

Then there is Section 501 and 502. If you look at those, the Bankruptcy Code actually permits that claims that are knowingly disputed and unenforceable to be filed in a bankruptcy court, because it's an adversarial system, where a debtor's attorney objects to the claim if they see that there is an issue under the (1) through (9) enumerated issues.

In this case, though, we have a proposed rule that says, well, creditors sanctioned for failure to comply by not attaching the last billing statement or by not itemizing interest, fees, and principal for an unsecured credit card account.

It seems like there is a dichotomy, especially when a debt is undisputed. The debtor schedules the debt, and there is an objection based on lack of documentation and there's no dispute.

There is also an issue of the ESIGN Act. I mentioned that there is a recognition that electronic data is equivalent to its written counterparts. It is undisputed that we live in a digital age, where people receive their statements electronically or they review their bank account statements, their credit card statements electronically.

If I receive a statement in the mail, it is not going to be as accurate as going online to get my balance at that time, because it won't reflect payments, it won't reflect any interest that has accrued since then, just like the computer file that B-Line gets we believe is the most accurate and updated information. It has the account balance at the time of the bankruptcy filing. And if the debtor ever believes that there is post-petition interest or fees added, there would be a difference in the balance that the debtor remembers, oh, well, I don't think it's 9,000. I think really it's 8,000. Then there would be an objection based upon the amount.

There is a check and balance currently, but this proposed rule essentially heightens -- in addition, the proposed rule seems to also heighten the standard for filing a proof of claim, just the threshold.

All the minority cases that I have read and also the majority cases, they equate a proof of claim to a complaint. If we're going to equate those two, then you have at least Civil Rule 8(a), which states that it's notice pleading with allegations sufficient to support relief. There is no requirement that you have to provide documentation sufficient to win on a motion for summary judgment, and if you don't provide it you are going to get sanctioned. There is a problem there.

As for the two penalties the Proposed Rule 3001, the

first penalty, there is a penalty that you are prohibited in amending a proof of claim. Again, going with the analogy of a proof of claim and a complaint, there is Civil Rule 15 that says that amendments should be allowed liberally in the interest of justice.

In this case, in the proposed rule the standard is that the party that wants to amend the claim needs to prove that it was substantially justified, that you omitted the evidence, or harmless. So essentially that is a more heightened level.

In addition to that, there is also a monetary sanction for not complying. For the monetary sanction there are a couple of problems. As you know, my client, we receive an electronic computer file of those accounts. In those cases, we don't have the last statement, and we believe that the computer file is sufficient, along with the facts and the representations and warranties are statistics, and the rule doesn't excuse a claimant for not having those documents. It excuses the claimant if the documentation is lost or destroyed and a statement has to be provided.

I would like to analogize the whole issue with discovery. With discovery on a subpoena or a request for documentation, if a debtor or a party does not have the documentation, they are not sanctioned or they're not required to provide those documents if you don't have it. Even if you

have the means to request those documents from a third party, you're still not required to provide them.

As an example, is a debtor required to contact his bank to get the monthly statements when there's a subpoena if the debtor doesn't have his documents? I don't believe that there is a case that would require that.

JUDGE SWAIN: Ms. Tran, I would ask that you work to wind up so that we have some time or for questions.

MS. TRAN: Of course. I would like to say just overall I think the Bankruptcy Code currently along with the Bankruptcy Rules process works very well. I believe that debtor's attorneys, trustees, U.S. attorneys, are all reviewing claim.

I receive objections sometimes from U.S. trustees -- not objections, but letter inquiries. I respond to those, and I don't hear back from the U.S. trustee's office.

I receive objections to claims from trustees. In Re Kirkland as a perfect example, that was a Chapter 7 trustee that litigated it all the way to the Tenth Circuit Court of Appeals.

So there are trustees that are looking -- I believe every trustee that I talk to says they look at claims. They compare a proof of claim to the schedules. If it matches, there is no issue.

I can't give you a percentage because I don't keep

track of how many claims are actually scheduled, but just anecdotally from when I review them, I would say about 85 percent, a high percentage of claims are actually scheduled. More likely than not, they are probably the exact amount that we file for.

My client does not add any post-petition interest. We do a lot of a lot of due diligence to make sure that we get the right debtor when we file the proof of claim and the information that we receive makes sense.

But overall I think that the process works. And if there is any recommendation, the recommendation would be essentially to find what is prima facie validity. I am sure we've seen a lot of decisions nationwide with a wide range of what is prima facie validity for a proof of claim.

Thank you very much.

JUDGE SWAIN: Thank you, Ms. Tran.

Professor Gibson, any questions?

MS. GIBSON: What is your position about how your client's currently complying with the existing rule, 3001(c), that requires the claims based on a writing, to provide that writing, and also the provision of the Form 10 that requires the itemization of principal and interest?

MS. TRAN: As for itemization of principal and interest, this is something that actually we can't provide. Recently I read my the credit card agreements that I have

entered into. Pretty much of all of them state that interest and fees are folded into principal on a monthly basis. So I believe that there is no -- especially when it's charged off the full amount, I guess the charge off is principal. When you buy these accounts, they have to be charged off.

So I guess technically the amount we provide is the charge-off amount, I guess what's considered principal under the contract.

In terms of complying with 3001 currently, we provide a summary, an account summary of the information from the computer file. We provide as much as we can that is available in the computer file. Our typical proof of claim has quite a lot of information. It has the debtor's name, Social Security, like you said, all the debtor's personal identifiers along with the account number, the charge-off date, the original creditor name, all that information that the debtor can look at and say, OK, I know what this debt is about. It's, for example, a Chase credit card, 1234, last four digits. I opened it in 2001, and I made a last payment sometime in 2008. I know that it can't be barred by statute of limitations.

So we provide sufficient information for a debtor to review. I believe that a lot of these accounts are voluminous in terms of documentation, and so we provide a summary for that.

MS. GIBSON: That is all I have.

JUDGE SWAIN: Thank you. Do any other committee members have questions? Judge Perris.

JUDGE PERRIS: In your recommendations, you indicate that to make a prima facie case you would recommend that the claimant provide the last statement sent to the debtor, plus then there's 15 items.

Do you have access to the last statement sent to the debtor, because some of the other people who testified seemed to say that those who buy claims in bulk don't have that?

MS. TRAN: I have only suggested that when it is available. Obviously a lot of this is just when it's available. I guess I forgot to put the parentheses.

Obviously, some things are just like you said. Well, like I said, lost or destroyed or just unavailable. Sometimes it's difficult to know whether it's lost or destroyed.

The reason why, I'll give you an example. There's been a lot of bank mergers. There's been a lot of system conversions. It is difficult for us to figure out, and sometimes even original issuers that we service for, to figure out, well, do we have this. You would have to go through, because it's a long chain of command, there's different data housed in different places.

So it is only a suggestion. But what I would do is at least the account information. As long as there is sufficient information to let the debtor know, hey, this is the debt, this

is who you owe, this the original issuer, this is the amount, this is the general information in terms much how much was charged off.

Of course, if the charge-off, and there's lots of comments about the last statement, which is usually the charge-off statement, doesn't match the proof of claim amount. Most likely it's just interest afterwards. When an account charges off, interest still accrues. A charge-off is only an accounting principle for a bank.

I tell debtors' attorneys, give me a call, write me a letter. You don't have to object to a claim. Ask me. If your client really has a concern about an account, ask me, give me a call, and then I will respond to you. I will get the information as soon as I can. And we request it.

Like I said, even though with the 99 percent that we don't receive an objection to a claim, I would say another 1 percent I receive phone calls and letters. For those we respond to them, and I never receive an objection to a claim.

I think it is a small community here. And a lot of people know each other. Most people I believe are reputable. A lot of debtors' attorneys I talk to they tell me that a majority of the time they review the petition, they talk to their client, they review the claim, and at the end of the day there's really, like 99 percent of the time there's no issue.

So the long story, to answer your question, when it is

available, we will request it. If there is a request or an objection to a claim we will request it. But other times I would say most of the time when I look at the last statement, it generally matches all the information we have. If it doesn't, I will go back to the original issuer and say, well, what happened. Explain. And then usually they will explain well you know we received a large payment and it went NSF. That's why the balance is much higher, and we will have documentation for that.

JUDGE SWAIN: Thank you. Mr. Rao, did you want to ask a last question of this witness?

MR. RAO: Yes. On the account summaries that you currently attach to proof of claims forms now, do you include the charge-off date and the last activity information?

MS. TRAN: Generally we do.

Actually I invite you to look at our recent filings. When it is available, we do. I would say a majority of the time, yes, we provide all of that information that you want or some of them. The charge-off date, generally we have that.

JUDGE SWAIN: Thank you very much, Ms. Tran.

MS. TRAN: Thank you.

JUDGE SWAIN: Our next witness is Carol Moore of Resurgent Capital Services.

Good afternoon, Ms. Moore.

MS. MOORE: Good afternoon.

I am going to cut my comments a little short from the written ones because I am one of the people who's going to be trying to fly south this afternoon.

So, just a little bit of background. Again, my name is Carol Moore. I'm senior vice president and assistant general counsel, Resurgent Capital Services.

Resurgent is a master servicer for a group of affiliated debt buyers, and we also provide services for some original issuers of credit.

We are headquartered in Greenville, South Carolina -- hence the flying south -- and we have just over 500 employees in four offices to handle the various services that we do for our clients.

By way of background, in terms of some statistics, in 2009 we filed 251,144 proofs of claim on behalf of our clients. The majority of these were on credit card accounts. A little less than one percent of claims that we filed received any sort of objection. About a quarter of those were actually upheld.

In the other cases the claims were allowed. I can submit electronically the breakdown by type of claim. The statistical folks at the company have sliced it and diced it a number of different ways.

JUDGE SWAIN: We would be grateful for that.

MS. MOORE: OK. All right. I will do that.

Our concern generally with the proposed rules is that

we believe that these amendments would impose a substantial burden on the creditor community without a concomitant balancing benefit to the Court and to creditors.

I am just going summarize a little bit of what I have written. With respect to statements as Ms. Tran alluded to, the last statement that a customer receives on a credit card account often contains very little substantive information about the account. It is often the last statement at charge-off.

So it may just say you still owe us money basically. It will have a dollar figure, but it doesn't have any history. It doesn't have interest rates. It doesn't have that sort of thing.

It's often, particularly for those of us who buy debt after charge-off, it often antedates the filing by quite a bit, because most credit card companies stop sending statements when the account charges off. So it could be a year or more old. It would not reflect payments that the customer has made. It wouldn't reflect additional charges or interest or anything like that.

So it doesn't really provide the debtor or the Court or the debtor's attorney with meaningful information about the account so they can compare it to what they think they owe.

On the itemization issue, again, as Ms. Tran alluded to, because of the way credit cards are structured, the balance

at any given time is a compilation of purchases, cash advances, finance charge, all of which is a sort of rolling forward number that at some point you can't break it down from the credit card company's perspective.

What we use, and what we would propose as an alternative to the requirement of attaching the last statement, is an account summary page that provides detailed information about the account. It provides the Social Security number, truncated of course, the account number -- I haven't got one in front of me, but I think it has the last payment date, the balance when we bought it, and that sort of thing.

So we think that provides useful information and allows the debtor and his or her attorney to compare the claim that's filed with their schedule and make sure that this is something that the customer recognizes.

It also indicates the name of the original creditor. So when they say, well, I have never heard of Resurgent, but I do know that I had a Chase act or I know that I had a Home Depot account, it allows them to do that. So that is our proposal as a way to accomplish the goal of the proposed amendments without unduly burdening the system and the creditors and their participation.

So, with that summary, I'm open to questions.

JUDGE SWAIN: Thank you, Ms. Moore.

Before I turn to my colleagues for questions, I would

make one supplemental supplementation request of you. The version that we got of your prepared remarks for some reason did not include the exemplar of the account summary. If you could supply that to us, we would be grateful.

MS. MOORE: Absolutely. I unfortunately can't blame my assistant for that. It is entirely my fault.

JUDGE SWAIN: It is not about fault.

Professor Gibson?

MS. GIBSON: When there is an objection to one of your claims, do you then provide additional information from what you originally attached to the proof of claim?

MS. MOORE: Depending on the nature of the objection obviously. We get, when we purchase the account, a string of data. Sometimes the data that's in that string, though it doesn't go on the summary, is relevant to the question.

We also engage in dialogue with the debtor's attorney, as Linh alluded to, that, you know, if you have a question ask us. If we can get you the answer, we'll get you the answer.

JUDGE SWAIN: Thank you.

Do other committee members have questions?

Judge Wedoff.

JUDGE WEDOFF: This question would really reflect both your testimony and the testimony we heard earlier. The assumption appears to be that if a debtor does not object to a proof of claim, the debtor accepts it as valid. Is that fair?

MS. MOORE: Yes. I think that's a fair statement.

JUDGE WEDOFF: Could it not be that the failure to object to a claim is due to the debtor's conclusion that there would be nothing gained for the debtor by objecting to the claim?

MS. MOORE: I guess that is possible. My assumption is that debtor's attorneys counsel clients if you don't think this is your debt, you need to do something about that.

JUDGE WEDOFF: If there's a limited pool of assets that are going to be distributed to the creditors, a limited pool in a Chapter 7 so that the debtor does not have a surplus estate, a limited pool in a Chapter 13 because the plan is not paying 100 percent, what economic motivation would a debtor have to fight about what actually is just a distribution among the creditors who are sharing in that pool?

MS. MOORE: Well, I guess there's sort of an integrity of the system argument. If I'm the debtor's attorney, I want to make sure that my client isn't being asked to pay someone to whom they don't owe money. And, yes, there may not be an economic incentive, but all we can do is file with the best possible information that we have and rely on the tension, in quotes, air quotes, between the creditor's side and the debtor's side to say, Wait a minute. This isn't right. I don't owe these on people money. I don't owe these people this amount of money.

JUDGE WEDOFF: Would the sanction of attorney's fees as an award for a successful objection increase the likelihood that a debtor would be likely to object to a claim that the debtor feels is inaccurate in circumstances that I just discussed?

MS. MOORE: It's hard to predict debtor behavior. But I guess my feeling is that, to sort of turn your initial comment on its head, the fact that an objection is successful doesn't necessarily mean that there was something wrong with submitting the claim.

For example, the objection might be successful because of the amount. It may be a difference between 8,000 and 9,000, but the claim itself, there is still a debt owed to this creditor.

So I don't know that an automatic award of an attorney's fees because an objection was successful would really be an appropriate remedy.

JUDGE SWAIN: Mr. Rao, did you wish to ask a question?

MR. RAO: Yes.

The exemplar that you provided, the proof of claim account detail, it includes the charge-off by original creditor in the last transaction date. Is that information that you currently, is this account detail in the form that you currently use?

MS. MOORE: Yes.

MR. RAO: You do provide that information.

MS. MOORE: Yes. This is actually redacted from one they sent me from a proof of claim that had been filed.

JUDGE SWAIN: Perhaps it's our fault that the rest of us don't have it. But, in any event, if you could send it again.

MS. MOORE: Absolutely.

JUDGE SWAIN: Are there any other questions for Ms. Moore?

Ms. Moore, thank you very much and safe and successful travels.

MS. MOORE: Thank you.

They tell me there are copies over here as well, but I will send an electronic copy as well because I know it's easier.

JUDGE SWAIN: Thank you very much.

Our next witness is David Shaev of the National Association of Consumer Bankruptcy Attorneys.

MR. SHAEV: Thank you for allowing me to testify today. I think I would like to stray from the submitted testimony and respond to some of the statements made by Judge Wedoff, which I really think cuts right to the heart of the matter.

Talking about debtor attorneys, I have been practicing law in this district, the consumer bankruptcy law, for about 29

years. The claims process is basically dysfunctional. There is no incentive in most cases for a debtor attorney to file objection.

We do not get paid to do that. We do not get sanction fees. We are not awarded fees. It's as simple as that. Most of the time if there's a claims objection all that's happening is there's more money for more creditors.

There was a study done by Professor Katie Porter on the mortgage process -- this is in my materials -- in 2008. She studied 1733 different Chapter 13 bankruptcies with mortgage lenders. Her findings are rather startling. She found that 96 percent of the claims were not even scrutinized. Over 52 percent were missing required documents. The underlying note was not there more than 41 percent of the time. The mortgage was not there 19 percent of the time, and the debtor and mortgagee disagreed as to the sum owed more than more than 95 percent of the time. Of that 95 percent, 70 percent or more favored the creditor. The average gap between the creditor's and the debtor's schedules was more than $6300, an incredible amount of money in Chapter 13 bankruptcy.

The inconsistencies in proof of claims both on the unsecured part and particularly in the mortgage claims undermine Chapter 13 mortgage cures. It is nearly impossible for a debtor attorney to put together a plan on a moving target.

One of the provisions in the new rule would be to allow for a simple cure procedure where the Court can determine or the trustee and debtor can determine that the debtor has in fact cured its mortgage.

Now what we see is at the end of the Chapter 13 plan payment we find that foreclosures are starting after the Chapter 13 is done because there are expenses that were incurred during the chapter 13 period. It really undermines Chapter 13, which is an attempt to save homes.

It was mentioned that the last statement on the unsecured creditor is not available and is currently not required. I currently have a case in White Plains where I objected to the mortgage proof of claim successfully.

The amount of work that came from that was as follows: We had two more motions in the bankruptcy court, one motion for a stay in the district court, and there are currently two appeals pending in the district court, an extraordinary amount of work uncompensated.

As far as the last statement, in that same case I objected to nine proof of claims unsecured. I send letters to each creditor before that demanding documentation. Of those nine claims, only one was able to provide proof, and there was approximately $900.

We expunged in excess of $39,000 from this one case in unsecured claims. More than 60 percent of the unsecured claims

were expunged. I requested and was not awarded any fees.

How many attorneys are going to do this throughout the country? That's why there's only 4 percent of claims even scrutinized. It's just not practical for debtors' attorneys to do this.

I have as an example -- this is not submitted with my testimony, but I will be glad to provide it. In that same case, Claim No. 12 was filed by PRA Receivables Management in excess of $12,000. It had a summary sheet. The summary sheet said PRA Receivables Management, successor in interest to HSBC Bank.

Before we filed this bankruptcy, we went to credit reports, we went online, Credit Infonet, which is an online search, we did everything possible with all the documentation of the debtor to list everything on Schedule F. There's nothing on this summary that allowed us to identify any debt on Schedule F. There was nothing on HSBC, and in fact, the claim was expunged.

So the supplemental summaries, they're the same thing we had in practically every unsecured debt. Now, do I object to 60 or 70 percent of claims? Absolutely not. If it doesn't benefit my client, I simply don't do it. If there is a mortgage objection, of course if it helps my client I will.

What about the integrity of the process? That's what seems to be left aside here.

It is the business model of these debt collectors to file claims, presume that no one will object to them, and they're correct. Practically no one objects to them. There's one or two attorneys in my district that do this. Nobody else.

We happen to be in a very good district where we have judges that will listen to us. I get e-mails all the time from people throughout the country. They just can't do what we do here.

Basically that is my testimony. I would hope that the committee would adopt these rules. In fact, we think that the rule should be strengthened to provide information, documentation, contracts, proof of standing, things of that nature.

I thank you.

JUDGE SWAIN: Thank you, Mr. Shaev.

Professor Gibson, any questions?

MS. GIBSON: Could you talk a little bit about the effect of receiving that last statement. What information would you gain from that that you're not currently getting from a summary of the account?

MR. SHAEV: The name of the bank, the name of who the actual creditor was. Perhaps we wouldn't have objected to it. I don't know. But it was not on the summary. The summary had a completely different bank that was on the credit reports that my client had, on all of her schedules, and on Credit Infonet,

which is a source that we use to check -- it's like an attorney search. Simply the name of who -- she might have said, yes, it's Discover Bank. I owe them money.

MS. GIBSON: Thank you.

JUDGE SWAIN: Are there other questions from committee members?

Thank you very much, Mr. Shaev.

MR. SHAEV: Thank you.

JUDGE SWAIN: Our next witness is Alane Becket from Becket & Lee.

MS. BECKET: Thank you.

Please excuse my reading my remarks. I want to make sure I hit my points.

My name is Alane Becket, and I am the managing partner at the law firm of Becket & Lee LLP in Malvern, Pennsylvania, where I have worked as an attorney for 17 years.

Becket & Lee has specialized in the nationwide representation of creditors and bankruptcy matters since the mid-1980s, representing primarily unsecured credit card issuers and unsecured debt purchasers.

Thank you for the opportunity to address the committee today.

I am a member of the American Bankruptcy Institute, where I serve on the board of directors and as cochair of the consumer bankruptcy committee. I completed my term as the

education director the ABI's consumer bankruptcy committee in 2009.

I am a member of the National Association of Chapter 13 Trustees, the National Association of Bankruptcy Trustees, the National Association of Retail Collection Attorneys, and DBA International, a trade association for debt purchasing entities.

I have spoken at conferences and written articles for most of these organizations on the subject of unsecured claim documentation and Rule 3001. However, my comments today are my own. I'm not speaking on behalf of any of the aforementioned organizations or any of my clients, but as a member of the bar who has extensive experience with the issue.

My law practice for much of the last nine years has focused primary on the defense of objections to our clients' claims. During this time I have supervised our team of attorneys and paralegals who receive, investigate, and coordinate responses to objections to claims nationwide.

Our firm has been lead counsel in many of the benchmark opinions involving claim objections based on 3001. The percentage of objections that our firm receives versus the amount of claims that we file is very small, similar to that of the other witnesses. This statistic may illuminate the perceived severity of any alleged problem. Despite this, because of the number of claims filed overall, the amount of

actions we handle is substantial.

My experience with this litigation has been that Rule 3001 is used as strategy by debtors to obtain disallowance of claims based on a putative noncompliance with Rule 3001 when the validity of the debt is not in question; that is, many claims are litigated on the sole basis that the claim allegedly lacks documentation. It is rare that I receive an objection that cites Rule 3001 that is also coupled with a dispute over the obligation.

If the objection is sustained, the strategy can be an effective way to address Chapter 13 plans that are not feasible for various reasons by refusing the amount of unsecured debt.

In Chapter 7 cases, debtors who expect to receive a surplus have standing to object to claims. Any claims that are disallowed result in money returned directly to the debtor. Objections based on technical noncompliance with Rule 3001 afford the debtor the possibility of addressing these scenarios.

When faced with an objection to a claims documentation on an otherwise undisputed obligation, a creditor must decide whether to incur the cost of defense for a potentially small recovery through the bankruptcy case or allow the claim to be disallowed by default. Even if the creditor ultimately prevails on the merits or provides even more documentation to resolve the objection, the expense may ultimately outweigh the

benefit.

A review of the record shows that Judge Wedoff originally proposed to amend Rule 3001 to address mortgage claims and the undisclosed charges mortgage companies or services add to the debt during the pendency of a Chapter 13 case. The subcommittee on consumer issues appointed a working group to study the issue. Thereafter the subcommittee submitted a memorandum to the advisory committee dated August 27, 2008. The memorandum is entitled, "Mortgage Payments in Chapter 13 Cases."

The subcommittee recommended that Rule 3001 be amended and that a new Rule 3002.1 be adopted to provide "a uniform national procedure in Chapter 13 cases for the disclosure of post-petition mortgage fees, expenses, and charges and other amounts required to be paid to cure arrearages and maintain mortgage payments."

The memorandum provided background information about the problem and the reasons for recommending national rules governing mortgages and Chapter 13 cases.

According to another memorandum by the subcommittee dated February 19, 2009, the proposals made by the subcommittee were circulated informally to two groups with which the subcommittee had conferred during the drafting process, the group of bankruptcy judges that was assembled and draft a model local rule to deal with mortgage charges in Chapter 13 cases,

and the National Association of Chapter 13 Trustees Group of Chapter 13 trustees, mortgage servicers and attorneys that had drafted a list of best practices for mortgage claims.

The memorandum went on to state that everyone who commented is supportive of the creation of national rules to govern mortgages in Chapter 13 cases.

As originally proposed, the amendments to Rule 3001(c) required, among other things, an itemized statement of any fees, expenses, or other charges in addition to principal included in the claim. However, this requirement was not limited to mortgage claims, which were the claims sought to be addressed, but was made applicable to all claims.

As you heard, the committee's proposal for an itemization may be very problematic for some unsecured creditors. My concern is that we will spend the next ten years litigating the information required to be included in an itemization for an unsecured debt and how far back it needs to go, because the requirement, while applicable to a closed end loan or secured debt, may not as easily be applied to a revolving account.

Moreover, debtors receive monthly statements from creditors during the life of a credit card relationship, and thus the requirement duplicates information already given to the debtor for no apparent purpose.

Regarding, the requirement certain claimants include

the last account statement, it wasn't until after the proposed amendments were drafted and approved that Judge Small made his suggestion to single out debt purchasers as filers of inadequately documented and/or stale claims.

With what appears from the record to be very little consideration of the validity of the alleged problem or study of the effects the amendment would have on unsecured claimants, the working group recommended that a claim filer be required to attach on its claim the last statement sent to the debtor.

However, because it is not improper to file a claim for a debt which would be barred from suit in a state court by the statute of limitations, nor is there a rule that requires assignees to include proof of ownership with their claims, the requirement that the last statement be attached is a solution without a problem.

Moreover, as the other witnesses will tell you, attaching the last statement presents other problems that may lead to more litigation, such as the disclosure of personal medical or otherwise embarrassing information about a debtor that may be gleaned from charges shown on the account statement.

Finally, the sanction of precluding the use of a omitted documents in a later proceeding will likely result in the disallowance of the claim in at least some, if not all, courts. This result violates Section 502(b), which sets forth

the sole grounds under which claim can be disallowed.

As you know, that list does not include disallowance based on a failure to attach documents to a claim. I do not believe this result is the committee's intent, but it is inevitable if claimants are not permitted to amend or otherwise defend their claims.

The attorney's fee provision will most certainly invite more litigation. The rule should not be drafted in a way that will encourage litigation with a promise of sanctions when there is no real underlying dispute as to the validity of the debt.

As you heard, already courts in several jurisdictions have added the proposed amendments to their local rules, with little or no notice of which we are aware. Not surprisingly, we have already received objections to claims based solely on noncompliance with the new rules.

Our clients are justifiably concerned about the sanctions they face if their claims are found to be deficient, and some have considered not filing claims in those jurisdictions because the rules are so vague that they are concerned that they will be found noncompliant.

Unsecured claim filers have come a long way since this litigation began in earnest several years ago. Creditors have become educated about what is required, and many opinions have analyzed the issue. There will always be inexperienced

creditors who not do not filed claims properly, but for the most part claims currently do what they should do: Inform the debtors of who the creditor is, what the debt is, and how much is owed.

The addition of Box 3A to the proof of claim form requiring that the claimant to state how the debtor may have listed the debt assists the debtor in identifying the original creditor when the debt has been transferred.

There has been much criticism of creditors because of the perception that they are too cheap or lazy or incompetent to file claims properly. The opposite is true. My experience is that creditors and debt buyers are trying to comply with the rules within the limits of reasonableness.

Bankruptcy is a loss from the outset for creditors, and the prospects for recovery in any given case are usually unknown at the claim is being prepared and filed. Creditors are unjustifiably criticized for trying to streamline and automate the process of claim filing within the bounds of Rules 9 and 11, making the process more difficult and expensive and exposing the creditors to sanctions for noncompliance will only serve to deter claim filing and give debtors more reasons to instigate litigation.

Debtors list their unsecured debts on Schedule F. Any claims that are filed that do not reconcile can be objected to. They are penalties for filing intentionally false claims in

addition to the inherent authority of the court to punish offenders.

Thus, I might respectfully suggest that much of the gamesmanship and litigation would be eliminated if the rules prohibited objections to claims where the underlying debt was not disputed, or prohibit a Rule 3001 objection that does not also articulate a substantive dispute with the debt.

Most importantly, I urge the committee to study unsecured claims further, determine whether a problem exists, and, if so, include both unsecured creditors and consumer debtor attorneys in the process to craft a fair resolution that meets the specific problem, as you did for the mortgage claim issue.

Again, thank you for allowing me the opportunity to present my comments to you.

JUDGE SWAIN: Thank you, Ms. Becket.

Professor Gibson, do you have any question.

MS. GIBSON: I just want to explore one thing with you, Ms. Becket.

Unlike Chapter 11, the Code does require that even those debts that are listed as undisputed, there still has to be a proof of claim filed. And the rules properly spell out what should be in a proof of claim.

Are you suggesting there shouldn't be any enforcement mechanism of the rules' requirements about what is required for

a proof of claim?

MS. BECKET: The proof of claim form allows a summary to be attached to a claim in lieu voluminous documentation. If you read all of the opinions, you see that some courts say that documentation for a credit card account is the account agreement. Some say it's the account statements. Some say it's the individual purchase slips.

So, in light of the fact that this is voluminous, what most creditors do is attach a summary to the claim. Now what belongs on a summary is also the subject of a lot of litigation.

But the other point that should be made is that Rule 3001 to me is an evidentiary rule. So if you attach the documentation, your claim reaches a certain level of evidentiary validity.

If you do not attach the documentation, you do not get the benefit of that evidentiary presumption. But that's it. So while I do think all creditors should, to the best of their ability, comply with the rule, I don't think that failure to comply with the rule should result in the disallowance of a claim.

JUDGE SWAIN: Judge Wedoff.

JUDGE WEDOFF: Ms. Becket, do you believe there is something in the proposed rule that elevates a failure to comply to disallowance?

MS. BECKET: Yes. That is my practical experience.

If a debtor objects to a claim that does not have documentation, there is an immediate presumption that the creditor should get documentation and give it to the debtor, either by amending the claim or attaching it to a response.

If the creditor is not allowed to do that, my very strong suspicion and experience is that the court will disallow the claim for failure of the creditor to meet the debtor's objection.

JUDGE WEDOFF: Perhaps I didn't get my question across clearly enough.

As you pointed out, the grounds for objection to a claim are set out in Section 502(b) of the Bankruptcy Code, and failure to attach documentation to a proof of claim is not one of those grounds.

What I'm asking you is, do you see anything in the proposed language that would change that situation?

MS. BECKET: No, I don't. Practically speaking, courts do disallow claims for failure to attach documentation. And sort of where they come from is, well, you haven't produced documentation, so you haven't proven that your claim is enforceable under state law. So, therefore, under 5302(b)(2) your claim can be disallowed.

JUDGE WEDOFF: But the objection would have to allege that the claim was unenforceable under state law.

MS. BECKET: It should, but they don't. And the claims are still disallowed.

My biggest fear is that this proposed rule will be used to disallow claims just like it's done today. But the inability of the creditor to respond is so limited because they can't produce the documentation that the debtor allegedly needs to determine the validity of the claim, that at a hearing a court will rule in the debtor's favor.

It happens today, and it's even more likely to happen if you don't have the opportunity to amend your claim or provide documentation in a hearing.

JUDGE SWAIN: Are there any other questions for Ms. Becket?

Judge Perris.

JUDGE PERRIS: Is there anything in the rule that you think precludes an amendment?

MS. BECKET: I think maybe. Because if you want to use your amended claim in a hearing to show the judge that you have provided the information, you will be precluded from using it.

There is one court right now that currently will not let you amend a proof of claim if an objection has been raised as a result of lack of documentation unless you get the debtor's consent, which typically won't happen, or you get leave of court. And those who have sought leave of Court have

been denied leave of court.

JUDGE PERRIS: Is there anything in the draft rule that makes that a problem?

MS. BECKET: I think you could probably amend your claim, and that's as far as you could go with it. The debtor would have to then willingly withdraw the objection, and considering that they filed it in the first place I would find that to be unlikely.

JUDGE SWAIN: Is there anything else for Ms. Becket?

Thank you so much.

Our next witness is David Wiernusz.

Good afternoon.

MR. WIERNUSZ: Good afternoon.

My name is David Wiernusz. I work for National Capital Management. I manage all of National Capital Management's bankruptcy-related litigation, including all of its local lawyers that are charged with responding to bankruptcy claim objections.

National Capital Management opposes several of the proposed amendments to Bankruptcy Rule 3001(c). Specifically, National Capital opposes the added requirement that it attach the last billing statement prior to the commencement of the case to the proof of claim.

National Capital opposes the added requirement that it attach an itemized breakdown of the balance to the proof of

claim.

And National Capital opposes the provision that would levy sanctions and attorney's fees on the creditor that files an insufficiently documented proof of claim.

In keeping with those three points of opposition, National Capital also opposes the amendments to Official Form 10, the proof of claim insofar as it requires unsecured creditors to attach a copy of the last account statement sent to the debtor prior to the bankruptcy petition.

The first reason why National Capital opposes the proposed amendments is that they will impermissibly abridge and modify a creditor's statutorily grounded substantive right to have his claim deemed allowed so long as that claim does not offend any of the nine exceptions set forth in Bankruptcy Code Section 502(b).

As a general and overarching proposition, a rule of procedure may not abridge, enlarge, or modify any substantive legal right. In bankruptcy, a creditor's claim may only be disallowed solely for the reasons set forth in 502(b).

Said another way, a creditor's right to have its claim disallowed is a substantive statutorily grounded right, a right that may not be abridged by a rule of procedure. By beefing up the procedurally grounded bases for objecting to a creditor's claim and exposing a creditor to sanctions and attorney's fees for merely procedural defects in its proof of claim,

constitutes a framework for constructively disallowing a creditor's claim, and that is an impermissible abridgement of that creditor's substantive rights.

Another reason why National Capital opposes the proposed amendments is that they fall short of addressing an illogic, an illogic where objections to proofs of claims are filed in cases where the debtors have asserted under oath in their bankruptcy schedules that they owe without dispute the very claim that is the subject of their own objection.

The proposed changes not only would do nothing to address this internal inconsistency of a debtor objecting to a claim that it has scheduled without dispute, but it would amplify it by adding newly created, procedurally based grounds for filing claim objections that lead to the disallowance of that creditor's claim.

My last point is about the committee's record up until now. We also oppose the amendments because in our view the committee's record simply doesn't have any statistical support that creditors routinely file overstated proofs of claim, but the record merely relies primarily on anecdotal cases to justify and to add a new and perhaps insurmountable rule that requires additional requirements to an estimated 3.3 million general unsecured proofs of claim that are filed annually.

The rules committee agenda materials for the meeting held on March 26 and 27 in San Diego included agenda item 4(b),

which is a memorandum from the reporter dated February 17, 2009. The reporter's memorandum summarizes the considerations of the working group which, without incorporating any quantitative data, concludes that there is a problem with inadequate documented proof of claims and inaccurate prefiling review of the proofs of claim.

The implication there is that proofs of claim filed without any supporting documents are inaccurate, an inference that is not supported by the committee's record.

To be fair, though, the committee's record does identify what it deems to be problems. Consider the committee's agenda materials for the March 2009 meeting at page 281: "The problem courts are facing is that bulk claim purchasers are just not complying with the rule."

And at page 9 of the committee's minutes of the March 2009 meeting: "The heart of the problem, the debtor would be required to expend resources to object to an inadequately documented claim before any sanctions come into play."

National Capital would submit that, short of quantitative data or significant evidence showing a nexus that inadequately documented claims necessarily means that the claims are faulty, overstated, or imprecise, the current rules of and procedures for handling disputed claims are well suited to address the problems that are presently set forth in the committee's own record.

Absent any significant evidence or statistical data supporting the need for any amendment, the Advisory Committee should adopt neither the proposed amendments to 3001(c) nor the changes to Official Form 10 that relate to the attachment of the last account statement sent to the debtor.

I would be happy to answer any questions.

JUDGE SWAIN: Thank you, Mr. Wiernusz.

Professor Gibson?

MS. GIBSON: Mr. Wiernusz.

MR. WIERNUSZ: Yes.

MS. GIBSON: Do you agree that when someone participates in a court proceeding to vindicate their substantive rights there are procedural requirements that they have to comply with?

MR. WIERNUSZ: Yes.

MS. GIBSON: So Rule 3001 is an attempt to spell the procedural requirements for filing of a proof of claim, and the burden is on the creditor to initially to take that step, isn't that right?

MR. WIERNUSZ: That is correct. In its present form, correct.

MS. GIBSON: What is it about the new provision that you think moves it from that function into abridging substantive rights?

MR. WIERNUSZ: The new provision doesn't directly

conflict with 502(b) in that the new provision does not provide expressly that the claim would be disallowed.

But what the attorney's fees and the sanction provisions would do is it would effectively close the door, tell the creditor that they are not welcome to participate in the bankruptcy case. Even in cases where they might not have all the supporting documents, but in cases where the debtor scheduled the debt, that creditor could not file that proof of claim without facing sanctions. That is a constructive, not explicit, disallowance of that creditor's claim.

(Continued on next page)

MS. GIBSON: But when that creditor bought that claim and anticipated that someone -- well, a number of clients anticipated that some of them might some day be in bankruptcy, did the creditor not also take into account what the procedural requirements would be to try and collect on that debt in bankruptcy?

MR. WIERNUSZ: They absolutely do, and under the present rules that is taken under consideration.

MS. GIBSON: I don't have anything further.

JUDGE SWAIN: Are there any more questions for Mr. Wiernusz?

Thank you very much, Mr. Wiernusz.

Our next witness is Barbara Sinsley. Good afternoon.

MS. SINSLEY: Good afternoon. My name is Barbara Sinsley, I'm a partner in the firm of Barron, Newburger & Sinsley. And I am in Tampa, Florida where I have the honor of knowing Judge Alexander Paskay, who is both brilliant and humorous. And although I profess that I'm not, generally speaking, a bankruptcy practitioner, I have met Judge Paskay on several occasions. I also serve as general counsel to DBA International, formerly known as the Debt Buyers Association.

My goal here today is to provide the committee with background to what the debt buying industry does and to address some unintended consequences that could occur with this amendment.

A little background on DBA International: DBA International is a trade association that was formed in 1997. We have 405 professional debt buyer members, 104 vendor and affiliate members. Our goal is to provide networking, educational and outreach opportunities to state and federal legislatures as well as the judiciary on debt buying. And like I say to my husband, I don't really understand football but it doesn't mean it's necessarily a bad thing.

We have a strict code of conduct, and we have a code that requires our members to comply with the Fair Debt Collection Practices Act and are governed mainly by the Federal Trade Commission. Many of our members are what are called active debt buyers where they purchase the debt and collect on it themselves, and we also have passive debt buyers where our members purchase the debt and outsource it to another outside agency.

The proposed amendments concern DBA as they impose new burdens upon creditors and their assignees. Despite what we hear as a lack of pressing need for such changes, the rule has the practical effect of discouraging debt buyers and creditors from pursuing legitimate claims. It would impose a disproportional and heavy, chilling effect on debt buyers, and the proposed changes will ultimately result in the decline in the value of the debt market which in turn would ultimately reduce the availability of credit to consumers.

The proposed amendments fundamentally alter the balance between debtors and creditors in bankruptcy. Under the current law and rules there is a balance between the rights and responsibilities of creditors and those of the debtors. This balance reflects the bankruptcy bargain. The debtor, as the party seeking relief from his or her debts, has the duty to fully disclose all of her assets and liabilities, and creditors are entitled to have their claim recognized on a sliding scale if no party objects, if the claim is properly filed, and the objecting party does not rebut the prima facie validity of the claim or the creditor presents competent evidence to prove the claim.

I think Judge Paskay said to me once that debtors are entitled to a fresh start but not necessarily a head start. The proposed amendments could foster litigation in other areas where there is a hope of recovery sanctions against the creditors and debt buyers.

I would like to address the Fair Debt Collection Practices Act, and federal courts have recognized that this is a new cottage industry out there where plaintiff attorneys are suing debt buyers and debt collectors for violations, some of which are technical violations, some of which of course are legitimate abuses.

My old company, Asset Acceptance, was sued for calling consumers consumers and calling our customers customers, and

the court in that case said well, while there are many things prohibited by the FDCPA, friendliness is not one of them. And one of the concerns of the sanctions section of this amendment is that it would foster additional what we call boot strapped claims where if you don't abide by this amendment then you will be sued under the FDCPA, which has an attorney fee provision, and we will have more of these type of suits filed against debt collectors for not filing the appropriate itemization and the sanctions.

The Seventh Circuit in 2004 held in the Randolph case that these type of claims, the FDCPA claims, could be filed not only in the bankruptcy court, they could also be filed in federal court. So now in Tampa we have adversary actions being filed in the bankruptcy court for fair debt violations on behalf of the trustees and the fear is that this amendment could add to that burden.

Another comparison I would like to make under the Fair Debt Collection Practices Act to this amendment is that under the Fair Debt Collection Practices Act a consumer is entitled to what is called validation or verification. When a consumer is sent an initial demand letter by a debt collector, they're afforded what is called the verification rights or validation rights whereby they have 30 days to dispute the claim or ask for information from their receipt.

They receive that information from the debt collectors

before the debt collector could start collecting again, but the case law that interprets what is validation or verification under the FDCPA currently states it is nothing more than giving the name of the creditor to whom the debt was initially owed, who it is currently owed to, and making sure that you have the right consumer and giving full amount of the debt. So in comparison to the amendment, the amendment here would require a greater burden than is required by the Federal Fair Debt Collection Practices Act.

As a bit of more history to debt buying, debt buying started over 45 years ago, but it's been more prevalent in the last ten years. There's currently five publicly traded debt buying entities, and of three of them -- I read their annual reports -- and three of them alone in 18 years have purchased over $105 billion in face value of debt. Now most of the debt buyers that our members buy is credit card debt, automobile deficiencies; our members aren't buying defaulted mortgages, generally. And these publicly traded companies are probably purchasing the bulk of the credit card debt out there that is available.

The debt buyers allow the credit originators to monetize the value of the defaulted debt and reinvest in capital elsewhere. Debt buyers assume the risk that the defaulted debt will be uncollectible in return for the possibility of making a profit. As a result, the amount

they're willing to pay will depend on the level of risk and the expense occurred. The proposed amendments increase both the transaction cost and the risk to debt buyers, thus reducing the value of the charged off debt to them.

Generally speaking, the debt buyer, in submitting their proofs of claim in a state court case, is allowed to use the business records exception and use the electronic files of the creditor. So under Rule, generally, 8026, the debt buyer will submit an electronic summary of the account and the judges balance the trustworthiness of that information.

The debt buyer's business is premised on the integration of the business records of the original creditor into its records and the debt buyer must primarily rely on the accuracy of the documents in pursuing the collection of the account, thereby satisfying the first factor for admissibility of the trustworthiness.

However, debt buyers cannot and should not be held to a higher standard than that of a creditor. For example, Ms. Tran was talking earlier about her credit cards and how she read the credit card agreements and what principal was. Under the National Bank Act, national banks are allowed to do what's called compounding of principal and interest to the date of charge off. And when I try to explain this to debt collectors in trainings and the like, compounding of interest is complicated, but if you think of a snowball rolling down a hill

and hitting trees and little kids and the snowball keeps going, that's principal. On the day of charge off it hits the bottom of the hill and that interest can no longer be rolled into this snowball. So under the National Bank Act, the financial institutions in the credit card debts are calling the end charge off balance principal, so a debt buyer cannot actually break down that principal if the creditor can't do it.

Now a debt buyer can break down post charge off interest. Like Ms. Tran said, some debt buyers do charge post charge off interest at simple interest, not compound, and some do not. So it is something that if a debt buyer is charging post charge off interest they could give that amount.

The proposed amendments to Rule 3001 we do not feel meet a pressing need. Taken together, the amendments that require the creditors to submit additional information and documentation and provide for the imposition and penalties would provide a greater burden to debt buyers and to the creditors and we feel would negatively impact the creditors and their assignees.

I would welcome any questions from the committee.

JUDGE SWAIN: Thank you, Ms. Sinsley.

Professor Gibson?

MS. GIBSON: I don't have any questions.

JUDGE SWAIN: Do the committee members have any questions?

Mr. Rao.

MR. RAO: Is your testimony that a creditor on a revolving charge account cannot determine the amount of funds paid, interest and fees and other, so it's all principal? They could not determine at the time of charge off, for example, what portion of that might be on interest or fees; is that what you're saying, it cannot be done?

MS. SINSLEY: It does not have to be done for credit cards. Under the National Bank Act a company issuing a credit card doesn't have to itemize those amounts. On other types of revolving debt they may be able to itemize those amounts.

MR. RAO: Do you know if it can be done?

MS. SINSLEY: On a credit card?

MR. RAO: Yes.

MS. SINSLEY: I don't know if it can be done. I know that generally speaking since they do not have to do that -- and I will defer to the American Bankers Association, perhaps, to address this further -- I don't think that this is something that is easily done.

MR. RAO: Do you know how your clients comply with the requirement of preparing a 1099C in terms of if it's a discharge of indebtedness?

MS. SINSLEY: That's a very good question. Reg 6050P is the 1099C requirement that encompasses both banks and also debt buyers. Debt buyers are financial institutions under that

reg. That particular reg does not have a definition of stated principal. So DBA, we are on the priority guidance plan of the U.S. Treasury Department to get a definition of stated principal, and what we have proposed is that it is the charge off balance. So currently when our members are submitting 1099Cs, what are using for the stated principal, yet undefined, is the charge off balance.

It would be helpful if the U.S. Treasury would address these things. Maybe the committee could help us on that.

MR. RAO: Thank you.

JUDGE SWAIN: Are there any other questions of committee members?

Thank you so much.

MS. SINSLEY: Thank you.

JUDGE SWAIN: Our next witness is Mr. Corwin.

And good afternoon, Mr. Corwin.

MR. CORWIN: Good afternoon, Judge Swain, and members of the committee. I'm Phil Corwin, I'm a private attorney, I live in Washington, DC. I'm here today to testify on behalf of my client, the American Bankers Association, and there are thousands of member banks. And I do want to thank the committee for permitting me to testify. Although the request was turned in late, we were rather surprised that the committee broke precedent and didn't cancel this hearing and went forward, and we appreciate the opportunity to be here. I'm

going to be addressing the proposed amendments the 3001 and the Proposed Rule 3002.1.

In general, to echo most of the other witnesses, we do not believe there is a problem with the unsecured debt sufficient to -- addressed in Rule 3001 sufficient to justify the changing of the balance that would occur from the proposed amendments. And overall we think both rules to a significant extent in various aspects changed the fundamental balance in bankruptcy and therefore involve policy issues that should be more properly addressed by Congress rather than a judicial branch committee that implements statutes.

In regard to proposed amendments to Rule 3001 we recognize that assuring accuracy and proof of claim is very important, but we believe the proposal places an unreasonable burden upon consumer lenders and upon debt purchasers who purchase charged off debt that in many cases would be impossible to satisfy, that overall the proposed amendments fundamentally alter the balance between debtor and creditor, that requiring additional information and penalizing the omission of this information would impose an additional costs on creditors that would not be justified and would encourage debtors to dispute otherwise undisputed claims, in fact claims they have listed on their filings, and would encourage unnecessary litigation which would not benefit certainly most of the parties or the courts.

It would also have an impact on the availability and the cost of consumer credit, whether it's a bank involved in a case or a debt buyer where the bank is depending on the debt buyers for some return of their loss on a charged off claim. To the extent that this makes it less feasible to collect on those claims or increases the cost of litigation and lowers the price paid for the debt, it's going to increase the losses and that's going to have an impact on consumer credit market. And again, we don't know of any seriously -- of any documented serious problems with regard to proof of claims for unsecured debt, consumer debt, that justify having a negative economic impact, particularly in the current economic climate.

Getting into more technical points, the inclusion of the last open end or revolving credit card statement we believe could just add confusion to the debtor as the actual claim is for the amount due on the date of the filing which may not correspond exactly to the balance shown on the last statement sent to the debtor.

Such statements could also be difficult or impossible to produce where bank mergers have occurred and debt purchasers could find it difficult or even impossible to even obtain such statements, particularly for debt of a substantial age.

It's also unclear what statement is being referenced, that of the original creditor or the demand letter sent by the debt purchaser. The requirement proposed for an itemized

statement of interest, fees and expenses would be difficult to impossible to comply with. Some of other witnesses addressed this.

If you want to understand the complexity of breaking these things down, just look the Regulation Z put out by the Federal Reserve Board for the Truth in Lending Act to see the complexity of defining exactly what these different components are for debt that revolves where the interest accrues but it's partially paid down. It's added to, subtracted to, it's over years, and to break that down at the time of bankruptcy filing -- and it's not clear from the proposed amendment whether this is just addressing post petition debt or all or pre-petition debt as well, you get into great complexities. And the rule does not propose any standardized calculation formula for determining how that division should be made, and frankly we're not sure what benefit that generally provides to the debtor, particularly in regard to pre-petition debt.

We also believe that these new documentation requirements to a significant extent would contravene the implied presumption of validity, according to the creditors claim under 3001F, and yet there's no waiver of 3001F as there is to the Proposed 3002.1. Let me add we oppose that waiver of the presumption in Proposed 3002.1. We're not advocating it here, but we think it's highly contradictory in the context of these proposals.

The proposed requirement to include a statement of the amount necessary to cure any default for debt secured by property, we think this needs further refinement. For example, if the claim is based upon a judgment lien then the cure amount would be the entire debt, if that's not clear from the proposal.

A proposed requirement for an escrow account statement for debt secured by a principal residence. We recognize the local rule in many jurisdictions but we believe the committee could provide a useful function here by going back to the drawing board and looking at devising a national form for the provision of such information and that such the rule for this part should await the development of such national form.

And the additional sanctions proposed to creditors for failure to provide the proposed documentation, to the extent they go beyond borrowing the presentation of the omitted information at the later stage of the case, let me differentiate while we think that may be within the proper scope, we don't agree it's proper policy to prevent any -- or to make it very difficult to amend those claim forms going forward. But again, we think this exceeds -- we don't find any statutory authority for those additional sanctions. And as stated earlier and by other witnesses, we think that's going to encourage a lot of additional litigation by debtor counsel once you provide for attorney's fees as a sanction.

Turning to Proposed 3002.1, the new rule, we think it's even more problematic here as to find the statutory authority. We know the committee began to consider this in earnest when there were statutory proposals before Congress, they were linked to proposals to permit cram down of debt secured by principal residence. The legislative packages including cram down have subsequently been defeated in both the House and the Senate, so we think the rule is -- we're trying to see what the statutory basis is when the legislative proposal that would have explicitly addressed and provided for it has been defeated and not likely to be renewed in this Congress.

Notices of changes in payment of the amount due to interest and escrow account amendments we believe should be entitled to presumption of validity absent evidence to the contrary and that Rule 3001F should not be waived as proposed. We're strongly opposed to that waiver in the proposed rule.

We believe that providing itemized notice of all fees, expenses and charges within 180 days after they were incurred may not be feasible in a significant number of cases and that any rule that goes forward on this should provide for a longer time period. And again, that portion of the rule we oppose to the waiver of Rule 3001F.

We also believe as a practical matter that many creditors would be unable to serve a statement on the debtor's

accounts by other parties within 21 days of receiving a notice asserting that the cure amount has been paid in full and that this period, if any rule goes forward, should be only to a minimum of 90 days and that a model form should be promulgated in conjunction with this requirement.

And again, we question the statutory basis for the provision of additional sanctions, particularly the debtor's attorney's fees.

And I would be pleased to answer any questions in regard to my testimony. Thank you.

JUDGE SWAIN: Thank you.

Professor Gibson.

MS. GIBSON: Let me ask you about one of the last points that you made about the time needed to comply with the statement of whether the debtors made all of their payments. What's the practical difficulty that a mortgagee would have in responding to that within 21 days?

MR. CORWIN: Let me just jot this down to make sure I address it in our full written statements which we plan to submit by the 16th.

Not being directly involved on a day-to-day basis in the mortgage lending industry and the bankruptcy court process, I am not fully -- I have been in conference calls with attorneys who are involved with that. They say in many cases the volume involved makes it very difficult if not impossible

to reply to that within three weeks of receipt. But we will fully document that in our submitted full statement on the 16th.

MS. GIBSON: Thank you.

JUDGE SWAIN: Do any other members of the committee have any questions?

Judge Wedoff.

JUDGE WEDOFF: How do you distinguish the provisions that already exist in the rules regarding failure to make discovery, which include attorney's fees provisions like the ones that are here, from a failure to provide documentation and information required by these rules? You say that there is no statutory basis for that particular sanction in this context but we have the discovery rules with the identical provisions.

MR. CORWIN: Well, again, I'm not trying to be evasive here. We will take a look at that, but we think it's a sufficient sanction against the creditors or debt buyers to not have their claim valid if they were to fail to provide the proposed documentation but there is certainly no ill intent on their part if they don't provide such documentation. And to provide for additional monetary sanctions for simply not providing some document that would be required by this new rule we think seems excessive, particularly in the context of the unsecured consumer debt where we don't believe there's any statistical basis for concluding there's a problem in this area

or abuse by creditors or debt buyers.

JUDGE SWAIN: Thank you.

Any other committee member questions?

Thank you so much.

MR. CORWIN: Thank you. And I'm going to depart your proceedings and hope to catch an earlier train to get home while I still can.

JUDGE SWAIN: Good luck, and we look forward to your additional submission.

Our final witness is Raymond Bell of Creditors Interchange Receivables.

Good afternoon, Mr. Bell.

MR. BELL: Good afternoon, your Honors, nice to see you. I first of all want to thank the committee for being patient with me of my invitation request, and I pulled it back and then at the last moment I found out that I could make it.

My name is Raymond Bell and I am vice president of Creditors Interchange, which is an accounts receivable management company. I have been involved in consumer bankruptcy claims since 1968, so I can take the pleasure of saying that I have managed bankruptcy cases under the Bankruptcy Act of 1898 up to and including the last ritual called the BAPCPA.

I don't represent any credit card bank or debt buyers or any association related to them. My comments and opinions

may not necessarily represent those of my company as well. Last but not least, I am not an attorney at law.

I thank the committee for this opportunity to testify on behalf of this proposed rule change. And I listened to the eloquency of the witnesses before me and I will try not to cover what they have covered but present to you my practical experience as being a manager and executive in charge of consumer bankruptcy cases for 15 years with three of the top largest credit card banks of the country which now are all under the umbrella of Bank of America.

But I think it's important for the committee -- which I find that this committee will make the right decision eventually, and I think this committee -- I want to commend this committee for first of all being able to promulgate rules on a poorly written and drafted law starting in April of 2005, and you have done a very good job at doing that. But I want to talk about some issues. I will try to talk slow as to not confuse anyone, but I want to be able to explain to you what happens in the trench warfare outside of lawyers, outside of judges, outside of trustees, what I have to do as a person in the banking industry.

I think the proposed rule is more geared to perception than reality, and I am wondering if I would be here if this country didn't face an economic cries as it did earlier; and two, we have to make sure, in my opinion, that we're dealing

with numbers which seem to be mostly non-verifiable. And let me address that.

The National Bankruptcy Review Commission and Congress suffered from lack of reliable data, and you've heard testimony today with an attempt to provide some of that data. But more importantly, if the data is not reliable then you're trying to use a cannon to shoot an insect, in my opinion, because what has to happen is fairness.

I think anyone that knows me, professionally or personally, knows that I advocate definitely coherent and cohesive rules in this arena called bankruptcy. But let me say a couple of things that I think is important for the purposes of this committee.

If you look at the total number of Chapter 13 cases filed in 2009, that equates to about 395,222, according to the ABI. With an informal sampling of 200 bankruptcies scheduled before I came here, there were nine credit cards or revolving claims listed in those schedules, in Schedule F. Assuming that all nine creditors filed a proof of claim, we now have 3,556,999 claims in the system. Today if the creditor and/or debt buyer are filing an attachment with a proof of claim, the number now becomes 7,113,396 pieces of paper in the system. If a creditor, which I don't agree, now has to attach another document, we now have 10,670,997 pieces of paper in the system.

Well, that would be fine, but the fact is 70 percent

of the Chapter 13 plaintiffs filed in country don't complete. So if you look at the number of documents that are still out there -- and I'm not suggesting the fact that the system can't hold that number of documents, but if you look at the total numbers of Chapter 13s in three years, we now are talking in the vicinity of 20 to 21 million pieces of paper right out there.

And I would like to say this, I don't know if getting an additional statement from a creditor -- because let me tell you what I have experienced personally, and I call it the begat of national banks, that's called mergers. At one bank I was most recently at, Fleet Credit Card, we purchased three other national banks through mergers. Then Bank of America came and got Fleet Credit Card.

However, when an acquisition through mergers or portfolios occur, everyone is interested in telling the new potential customers welcome to this new bank, but what they don't do is tell the customers that filed for bankruptcy. One of the witnesses had suggested, and I congratulate them, that they attempted to look at a credit report to look at who the creditor was. It's likely and possibly that once accounts charge off, creditors stop reporting those accounts to credit reporting agencies so therefore the name that's in the credit bureau may be the name of the bank that was acquired by the other bank.

Without a state of confusion, it's interesting to me that these rules are looking at five percent of the total loan composition of national banks insured by the Federal Deposit Insurance Corporation. Five percent of the total loan composition in this country, according to the FDIC, is revolving credit or credit cards.

To make matters worse, in relation to numbers, as you may recall, one of the requirements of the BAPCPA was to do a study or an analysis of information from bankruptcy schedules that were a year after that law. The report was made, and I would caution you on one thing, that even with data, the report suggested that $139 million of, quote, unscheduled debt, was because the information wasn't put in the right block.

But what we're going to do is suggest that we got you again. That is, if you're going to penalize in this rule where a creditor or debt buyer isn't successful, doesn't attach the documentation, what are you going to do when a debtor or debtor's attorney brings an objection and they lose? Should not they then be obligated to pay the attorney fees of the creditor or debt buyer that has to pay to defend that action?

As I said in my testimony, I'm an agent professional in an agent profession and I think at times I kind of think of my military days that Congress is empowered to make bankruptcy law under Article I, Section 8, Clause 4. Those in the military know what Section 8 means. We can't even seem to get

the definition or the derivative of where bankruptcy came from; French, Italian, Spanish.

But what I do suggest to the committee is this: You have heard testimony that I agree with, all the people that are talking, but when you talk about a statement in a bankruptcy proceeding you have to think about a bank and the multiple what is called billing cycles inside of the bank. And I will gladly give you the sheet that I used in a presentation to an agency up here in New York City about the cycles and what happens in billing cycles at national banks. Because the fact is when that account charges off, the bank knows that any interest -- or my bank did, any interest that was accumulated after that date that petition filed they take as a loss, so that balance that they're reporting are charges or interest up to and including the date of the filing.

I'm not worried about the weather but I'm quite sure a lot of people here are worried about the weather, but I will certainly answer any questions you may have and most of you know I will answer them to the best of my ability.

JUDGE SWAIN: Thank you, Mr. Bell.

Professor Gibson?

MS. GIBSON: I don't have any questions.

MR. BELL: Sorry, I was looking forward to it.

JUDGE SWAIN: Do any of the committee members have questions for Mr. Bell?

Well, you have run us out.

MR. BELL: Not the first time, your Honor.

JUDGE SWAIN: Thank you so much. And I would like to thank all of the witnesses and all of the attendees here today. This information is extremely important in our deliberative process and the committee will consider the testimony and all of the submissions.

Our next meeting is in New Orleans in April, and the information regarding that public hearing will, as usual, be posted on the rules Web site and materials prepared in connection with the meeting will also be posted on the Web site in accordance with the usual cycle.

And so safe travels to those who are traveling, good weather to those who are not, and best wishes.

Thank you all. We're adjourned.

o0o